EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 86-651-CFX
Status: GRANTED

Title: United Paperworkers International Union, AFL-CIO, et al., Petitioners
v.
Misco, Inc.

Docketed:
October 20, 1986

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Gold, Laurence Stephen, Silberman, David

Counsel for respondent: Gear, A. Richard

Entry	Date	Note	Proceedings and Orders
1	Aug 11 1986		Application for extension of time to file petition and order granting same until October 1, 1986 (White, August 13, 1986).
2	Sep 19 1986		Application for further extension of time to file petition and order granting same until October 20, 1986 (White, September 22, 1986).
3	Oct 20 1986	G	Petition for writ of certiorari filed.
5	Nov 17 1986		Order extending time to file response to petition until December 23, 1986.
6	Dec 11 1986		Brief of respondent Misco, Inc. in opposition filed.
7	Dec 17 1986		DISTRIBUTED. January 9, 1987
8	Dec 31 1986	X	Reply brief of petitioner United Paperworks International filed.
9	Jan 12 1987		Petition GRANTED.
			**********
10	Jan 7 1987		Decision of DC Circuit Court of Appeals, 85-0228 received and distributed.
12	Jan 21 1987		Order extending time to file brief of petitioner on the merits until March 28, 1987.
13	Mar 3 1987		Record filed.
14	Mar 3 1987		Certified copy of original record and proceedings, 3 volumes, received.
15	Mar 27 1987		Brief amicus curiae of Natl. Academy of Arbitrators filed.
16	Mar 27 1987		Brief of petitioner United Paperwrks. Intl. filed.
17	Mar 27 1987		Joint appendix filed.
19	Apr 9 1987		Order extending time to file brief of respondent on the merits until May 30, 1987.
21	May 21 1987		Order extending time to file brief of respondent on the merits until June 3, 1987.
22	Jun 3 1987		Brief amicus curiae of Northwest Airlines, Inc., et al. filed.
23	Jun 3 1987		Brief of respondent Misco, Inc. filed.
24	Jul 1 1987		CIRCULATED.
25	Jul 20 1987		SET FOR ARGUMENT. Tuesday, October 13, 1987. (4th case).
26	Oct 6 1987	X	Reply brief of petitioner United Paperwrks. Intl. filed.
27	Oct 13 1987		ARGUED.

86-651

No.

Supreme Court, U.S.
FILED
OCT 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO and OUACHITA LOCAL 654,

Petitioners,

v.

MISCO, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LYNN AGEE
MARK BROOKS
3340 Perimeter Hill Drive
Nashville, Tennessee 37211

MICHAEL H. GOTTESMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
DAVID SILBERMAN
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:
ROBERT H. URANN
Gardner, Robein & Healey
3540 Severn Avenue
Metairie, Louisiana 70002

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

80

QUESTIONS PRESENTED

1. Whether a federal court may refuse to enforce an arbitration award under a collective bargaining agreement on the ground that enforcement of the award would contravene "public policy," where the award neither construes the agreement in a manner that would make the agreement unlawful nor directs the employer to take any action that is prohibited by law.

2. If the answer to Question 1 is "yes", what are the limits of the courts' power to refuse enforcement of arbitration awards on the basis of supposed contravention of public policy?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING WRIT	6
CONCLUSION	17
APPENDICES:	
A. Opinion of the Court of Appeals (August 19, 1985)	1a
B. Order of the Court of Appeals Denying Rehearing (June 3, 1986)	14a
C. Opinion and Order of the Western District of Louisiana (October 3, 1984)	16a
D. Opinion of the Arbitrator (October 31, 1983)	25a
E. Order Extending Time to File Petition for Certiorari (August 13, 1986)	54a
F. Order Further Extending Time to File Petition for Certiorari (September 22, 1986)	55a

TABLE OF AUTHORITIES

Cases	Page
AT&T Technologies, Inc. v. Communication Workers, —— U.S. ——, 106 S. Ct. 1415 (1986)	7
Amalgamated Meat Cutters v. Great Western Food Co., 712 F.2d 122 (5th Cir. 1983)	15
Amalgamated Transit Union v. Aztec Bus Lines, 654 F.2d 642 (9th Cir. 1981)	12
American Postal Workers Union v. United States Postal Service, 789 F.2d 1 (D.C. Cir. 1986)	7, 10-11
American Postal Workers Union v. United States Postal Service, 682 F.2d 1280 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983)	15
Bevles Co., Inc. v. Teamsters Local 986, 791 F.2d 1391 (9th Cir. 1986), *pet for cert. pending*, No. 86-431	7, 12
E.I. DuPont de Nemours v. Grasselli Emp. Ass'n, 790 F.2d 611 (7th Cir. 1986), *cert. denied*, —— U.S. ——, 55 LW 3235 (Oct. 6, 1986)	7, 10, 13-15
Ethyl Corp. v. Steelworkers, 768 F.2d 180 (7th Cir. 1985)	16
Graphic Communications Union v. Chicago Tribune Co., 779 F.2d 13 (7th Cir. 1985)	16
International Ass'n of Mach., Dist. No. 8 v. Campbell Soup Co., 406 F.2d 1223 (7th Cir. 1969), *cert. denied*, 396 U.S. 820 (1969)	13, 15
Kane Gas Light and Heating v. Intern. Broth., etc., 687 F.2d 673 (3rd Cir. 1972), *cert. denied*, 460 U.S. 1011 (1983)	13
Local 449, UAW v. Keystone Consolidated Industries, Inc., 793 F.2d 810 (7th Cir. 1986), *pet, for cert. pending*, No. 86-406	12, 16
Local 453, Internat'l U. of E., R. & M. W. v. Otis Elevator Co., 314 F.2d 25 (2d Cir. 1963) *cert. denied*, 373 U.S. 949 (1963)	13, 15
Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159 (7th Cir. 1984)	16
Misco, Inc. v. United Paperworkers Intern. Union, 768 F.2d 739 (5th Cir. 1985)	*passim*
Muschany v. United States, 324 U.S. 49 (1945)	9

TABLE OF AUTHORITIES—Continued

Page

Peabody Coal Co. v. United Mine Workers, 120 LRRM 2270 (S.D. Ohio 1985) 13

Premium Bldg. Products Co. v. United Steelworkers, 616 F. Supp. 512 (N.D. Ohio 1985), *aff'd*, 798 F.2d 1415 (6th Cir. 1986) 13

S. D. Warren Co. v. United Paperworkers Intern., 632 F. Supp. 463 (D.Me. 1986) 13

Schmidt v. Republic Airlines, 630 F. Supp. 1303 (D. Minn. 1986) 13

Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960) 7-8

Super Tire Eng. v. Teamsters Local Union No. 676, 721 F.2d 121 (3rd Cir. 1983), *cert. denied*, —— U.S. ——, 105 S. Ct. 83 (1984) 13

United States Postal Service v. American Postal Workers Union, 736 F.2d 822 (1st Cir. 1984) ..7, 10, 11

United States Postal Service v. Nat. Ass'n of Letters Carriers, 789 F.2d 18 (D.C. Cir. 1986) 11, 16

W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983) ..... *passim*

Wyman-Gordon Co. v. United Steelworkers of America, 613 F. Supp. 626 (N.D. Ill. 1985) 13

Statutes

Labor-Management Relations Act:

Section 203(d), 29 U.S.C. § 173(d) 7

Section 301, 29 U.S.C. § 185 ..... *passim*

Miscellaneous

BNA, Labor Arbitration Cumulative Digest and Index Covering Volumes 71-80 (1984) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No.

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO and OUACHITA LOCAL 654,

Petitioners,

v.

MISCO, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Misco, Inc. v. United Paperworkers Inter. Union*, 768 F.2d 739 (5th Cir. No. 84-4727; August 19, 1985).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 768 F.2d 739, and is reprinted *infra* at App. 1a-13a. The opinion of the United States District Court for the Western District of Louisiana is unreported, and is printed *infra* at App. 16a-24a. The arbitrator's award at issue is unreported, and is printed *infra* at App. 25a-53a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 19, 1985 (App. 1a, 7a). A timely petition for rehearing was denied on June 3, 1986 (App. 14a-15a). On August 13, 1986, Justice White signed an order extending the time for filing a petition for writ of certiorari to and including October 1, 1986 (App. 54a). On September 22, 1986, Justice White signed an order further extending the time for filing a petition for writ of certiorari to and including October 20, 1986 (App. 55a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Company (respondent) and Unions (petitioners) were, at all times relevant here, parties to a collective bargaining agreement covering the production and maintenance employees at the Company's plant in Monroe, Louisiana.[1] The agreement provided that the Company would not discharge employees without "just cause," and

---

[1] Petitioner United Paperworkers International Union, AFL-CIO ("UPIU") is the exclusive bargaining representative of the employees. Petitioner Ouachita Local 654 is affiliated with UPIU. UPIU and the local both were parties to the collective bargaining agreement with the Company.

contained a typical grievance-arbitration provision entitling the Unions to take to arbitration any grievance "arising out of the interpretation or application of the terms of this Agreement." The agreement declared that an arbitrator's decision "shall be final and binding to both parties of this Agreement."

On February 7, 1983, the Company discharged Isiah Cooper, an employee covered by the agreement. The stated ground for discharge was that Cooper had "violated company rules in being in a car [in the Company's parking lot] with a lit marijuana cigarette." (App. 27a.) The rule Cooper was alleged to have violated listed, among the "causes for discharge":

> Bringing intoxicants, narcotics, or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics, or controlled substances. [App. 31a].

The precipitating cause of the discharge was that Cooper had been arrested by the police on January 21, 1983, after sitting in the *back* seat of another employee's car in Misco's parking lot. At the time of the arrest, a lit marijuana cigarette was found in the ashtray of the right *front* door of the car, two employees having vacated the front seat of the car just prior to Cooper's arrest. (App. 2a-3a, 48a-49a.)[2]

A grievance was filed protesting the discharge. The parties were unable to resolve the grievance and the Unions therefore took the matter to arbitration. Under the auspices of the Federal Mediation & Conciliation

---

[2] The police were on the Company's premises because, having searched Cooper's home pursuant to a warrant and found marijuana there, they had him under surveillance. Cooper ultimately pleaded guilty to a charge of possession of marijuana in his home. Cooper was never charged criminally for either possession or use of marijuana on Company premises (App. 8a, 34a-35a, 40a, 50a-51a).

Service, the parties selected as arbitrator Milden J. Fox, Jr., a professor of industrial engineering at Texas A&M University and an experienced labor arbitrator.[3]

The arbitrator sustained the grievance, concluding that the Company had discharged Cooper without just cause, and ordered that Cooper be reinstated with backpay. The arbitrator applied the traditional labor arbitration rule that the employer has the burden of proving that a discharge was for just cause. Here, the sole evidence presented by the Company to support the ground for discharge was that Cooper had been sitting in the back seat of a car and a lit marijuana cigarette was found in an ashtray in the front seat where two other employees had been sitting. That evidence, the arbitrator concluded, was insufficient to establish that Cooper either possessed or had smoked a marijuana cigarette on plant premises, and thus insufficient to establish that Cooper had violated the Company's rule. (App. 42a, 50a-51a.)

At the arbitration hearing, the Company had offered evidence of a separate event of which it had not been aware at the time Cooper was discharged, but which the Company discovered eight months later on the eve of the arbitration hearing: that on the day of Cooper's arrest, the police had also searched Cooper's *own* car (a different car from that in which he was sitting prior to arrest) and had found a plastic bag containing marijuana "gleanings" in a microscopic quantity too small to be usable (App. 3a, 8a, 22a, 46a). The arbitrator refused to consider this evidence in determining whether the discharge was for just cause, for two reasons: (1) "just cause" requires that an employer have had grounds justifying discharge when the discharge action was taken, and an employer cannot defend a discharge on grounds that were unknown to it at the time of discharge and that thus constitute post-hoc rational-

---

[3] See BNA, Labor Arbitration Cumulative Digest and Index Covering Volumes 71-80 (1984), pp. 857-58.

izations; and (2) to entertain justifications for discharge at the arbitration stage that were never proffered in the steps of the grievance procedure would undermine the role of the grievance procedure as the primary forum for the resolution of grievances (App. 43a, 45a-47a, 49a).

The Company refused to comply with the arbitration award, but, instead, instituted this lawsuit against the Unions, under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, seeking an order vacating the arbitration award. In its complaint, the Company alleged, *inter alia*, that the award contravened public policy.

The parties filed cross motions for summary judgment, and the district court granted the Company's motion and vacated the arbitration award. The district court declared that "an award that is contrary to law or public policy need not be enforced" (App. 20a). In the district court's view the presence of marijuana gleanings in Cooper's car meant that the award reinstating Cooper offended two public policies: the policy against marijuana possession, and the policy against operation of dangerous machines by workers under drug influence (App. 22a). "For this reason," the court concluded that the Company was entitled to an order setting aside the arbitrator's award. (*Id.*).

A divided court of appeals affirmed. The majority (Judge Gee, joined by Judge Higginbotham), although broadly hinting that the evidence before the arbitrator justified a finding that Cooper had smoked a marijuana cigarette, stopped short of overturning the arbitrator's contrary finding of fact (App. 2a-3a). It was enough to invalidate the award, said the majority below, that the arbitrator knew that there were marijuana gleanings—albeit in a quantity too small to be usable—in Cooper's car, for this meant that the reinstatement of Cooper would contravene public policy:

> The arbitrator in today's case, focusing chiefly on his conception of "industrial due process," ruled for

> Cooper in great part because the employer did not at the time it discharged him *know* of the marijuana residue that he undeniably brought onto the plant parking lot.
>
> . . . [H]is narrow focus on Cooper's procedural rights has led him to enter an award directing the employer to put Cooper back to operating a hazardous machine, dangerous to himself and to others, at a time when the arbitrator knew that in fact Cooper *had* brought drugs onto company premises, in violation of Louisiana law and of a clearly-stated company rule. The public policy involved today is . . . one against the operation of dangerous machinery by persons under the influence of drugs or alcohol. Gazing at the trees, and oblivious of the forest, the arbitrator has entered an award that is plainly contrary to serious and well-founded public policy. [App. 7a; emphasis in opinion].

Judge Tate, dissenting, reasoned as follows:

> [E]ven though possession of marijuana violates *a* public policy, *see* La. Rev. Stat. Ann. 40:966(D), we cannot say that reinstatement of an employee in whose car were found non-employment-related traces of marijuana would violate any "well defined and dominant" public policy against using or being under the influence of marijuana *while at work.* [App. 13a; emphasis in opinion.]

REASONS FOR GRANTING THE WRIT

In *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983), this Court recognized an exception to the general principle that arbitration awards under collective bargaining agreements are to be enforced so long as they draw their essence from the agreement: "If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it," *id.* at 766.

In the wake of *Grace*, the Courts of Appeals have issued decisions that are in irreconcilable conflict as to

the scope and meaning of this "public policy" exception. The District of Columbia and Ninth Circuits have held that the exception applies only when the arbitration award gives a construction to the agreement that renders the agreement unlawful, or directs a party to take an action that would be unlawful. *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986); *Bevles Co. Inc. v. Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986). The First and Seventh Circuits, as well as the Fifth Circuit in the instant case, have expressly rejected that view, concluding that the exception is broader and entitles courts to vacate arbitration awards in some circumstances even though the agreement as construed by the award is wholly lawful and the action directed by the award is wholly lawful. *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984); *E.I. DuPont de Nemours v. Grasselli Emp. Ass'n*, 790 F.2d 611 (7th Cir. 1986) *cert. denied*, —— U.S. ——, 55 LW 3235 (Oct. 6, 1986); *Misco, Inc. v. United Paperworkers Intern. Union*, 768 F.2d 739 (5th Cir. 1985). Under the principles announced by the District of Columbia and Ninth Circuits, the arbitration award in the instant case would *not* have been vacated.

This circuit conflict poses a most serious threat to the important national labor policy favoring "[f]inal adjustment [of disputes arising under collective bargaining agreements] by a method agreed upon by the parties. . . ." Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d). That policy has "served the industrial relations community well" and has "led to continued reliance on arbitration" to settle such disputes. *AT&T Technologies, Inc. v. Communication Workers*, —— U.S. ——, 106 S. Ct. 1415, 1418 (1986). In originally announcing the narrow scope of review for labor arbitration awards, this Court observed that "plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would

almost never be final." *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 599 (1960). The present conflict in the circuits as to the scope of the "public policy" exception has precipitated a comparable unravelling of the federal interest in arbitral finality.

A. The standard that ordinarily controls the review of labor arbitration awards has been settled for more than a quarter-century. As recounted in *Grace*, 461 U.S. at 764:

> Under well-established standards for the review of labor arbitration awards, a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). When the parties include an arbitration clause in their collective-bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "dra[w] its essence from the collective bargaining agreement," *id.* at 597, a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous. *Id.*, at 598.

While reaffirming this standard in *Grace*, the Court marked out, in the following terms, the "public policy" exception whose applicability is the issue in the instant case:

> As with any contract, however, a court may not enforce a collective-bargaining agreement that is contrary to public policy. See *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948). . . . [T]he question of public policy is ultimately one for resolution by the courts. . . . If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. *Hurd v. Hodge*, 334 U.S., at 35. Such a public policy, however, must be well defined and dominant, and is to be ascer-

> tained "by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Muschany v. United States*, 324 U.S. 49, 66 (1945). [461 U.S. at 766.] [4]

In *Grace*, the employer alleged that the arbitration award directed it to take action that was contrary to an outstanding court injunction. The Court in *Grace* made it plain that an award would be unenforceable because in contravention of public policy if the award ordered the employer to take an action forbidden by an outstanding court injunction (*id.* at 766-67). But because the Court concluded that that circumstance in fact was *not* present in *Grace*, the award there was enforced (*id.* at 768-70).[5]

B. In the instant case, the Court of Appeals did not rule that the arbitrator's award failed to "draw its essence" from the collective bargaining agreement. Nor did that court suggest that compliance with the award would require the Company to violate any law, regulation, injunction or other legal command. Nonetheless, the court below overturned the award as offensive to "public policy", because the award directed the employer to reinstate an operator of dangerous machinery who possessed a small, unusable quantity of marijuana in his car in the employer's parking lot and, in the view of the majority below, thereby conflicted with the public interest in plant safety.

---

[4] In *Muschany* the Court continued as follows:

> As the term "public policy" is vague, there must be found definite indications in the law of the sovereign to justify the invalidation of a contract as contrary to that policy. It is a matter of public importance that good faith contracts . . . should not be lightly invalidated. Only dominant public policy would justify such action. [324 U.S. at 66.]

[5] The Court in *Grace* also rejected the employer's argument that public policy would be contravened by holding it to a contractual promise inconsistent with a later promise made to the EEOC in a conciliation agreement (*id.* at 770-72).

Two other appellate courts have likewise understood the "public policy" exception established by *Grace* to authorize the vacation of arbitration awards although the action directed by the award would be lawful. In *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984), the First Circuit refused, on publicy policy grounds, to enforce an arbitration award directing the reinstatement of an employee who had been discharged following an embezzlement conviction. The First Circuit did not dispute the union's contention that the employer could lawfully reinstate the employee; instead, that court rejected the legal conclusion that the union contended made that fact dispositive, *viz*, that an arbitration award is contrary to public policy only if compliance with the award would violate "a direct legal prohibition," *id.* at 824. Similarly, in *E.I. DuPont de Nemours v. Grasselli Emp. Ass'n*, 790 F.2d 611 (7th Cir. 1986), *cert. denied*, —— U.S. ——, 55 LW 3235 (Oct. 6, 1986), although enforcing an arbitration award reinstating an employee who had gone beserk and committed criminal offenses, the Seventh Circuit expressly rejected the proposition that "so long as the reinstatement of [an] employee does not violate any rule of positive law, the award cannot be overturned on the ground of public policy," *id.* at 616. The *DuPont* decision relied upon the decision below in the instant case to support its conclusion in this regard.

The foregoing First, Fifth and Seventh Circuit decisions are in direct conflict with decisions of two other courts of appeals. In *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986), the District of Columbia Circuit upheld an award that ordered reinstatement of a postal employee who had admitted converting postal funds to his own use. Rejecting the Postal Service's contention that public policy would be contravened by requiring it to employ an admitted converter of postal funds, the court stated its understanding of the limit of the public policy exception recognized in *Grace* to be

> that courts will not enforce an arbitration award if the award itself violates established law or seeks to compel some unlawful action. [*Id.* at 8.]

As thus understood, *Grace* did not support the Postal Service's public policy contention:

> There is surely no doubt that the instant case does not pose a situation requiring the invocation of a public policy exception. The arbitrator's award was not itself unlawful, for there is no legal proscription against the reinstatement of a person such as the grievant. And the award did not otherwise have the effect of mandating any illegal conduct. [*Id.*]

And the District of Columbia Circuit took direct issue with the First Circuit's decision in *Postal Service v. Postal Workers Union*, *supra*, stating: "Frankly, we find it difficult to square either the rationale or the result in the [First Circuit] case with the Supreme Court decision in *W.R. Grace*. . . ." (789 F.2d at 9.)[6]

The same understanding of *Grace* was adopted by the Ninth Circuit, which prior to *Grace* had posited incon-

---

[6] The District of Columbia Circuit applied the same standard in *United States Postal Service v. Nat. Ass'n of Letter Carriers*, 789 F.2d 18 (D.C. Cir. 1986). There, an arbitrator had construed an agreement subjecting the exercise of management rights to "applicable laws and regulations" as requiring the Postal Service to pay a postal employee, in accordance with a Tennessee statute, for service on a local court jury. The Postal Service contended that the award "is contrary to a well-defined public policy of federal supremacy or preemption, under which the Postal Service's operations are not to be subjected to a patchwork of conflicting state laws," *id.* at 20. In rejecting that contention, the District of Columbia Circuit reiterated the holding in its prior decision and reasoned as follows:

> [T]he Postal Service concedes that the public policy of federal supremacy does not preclude it from *agreeing* to subject itself to the Tennessee law. . . . Because the contract has been interpreted by the arbitrator to include an *agreement* by the Postal Service to comply with this particular statute as "applicable law," any public policy against *compelling* the Postal Service to obey such laws is inapposite. [*Id.* at 21; emphasis in court's opinion.]

sistency with law as the limit of the "public policy" exception, *Amalgamated Transit Union v. Aztec Bus Lines*, 654 F.2d 642, 644 (9th Cir. 1981), and which adhered to that position, after *Grace*, in *Bevles Co., Inc. v. Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986), *pet. for cert. pending*, No. 86-431. In *Bevles*, the court enforced an arbitration award requiring the employer to reinstate two employees who had been discharged when they were discovered to be undocumented aliens. The employer's contention that public policy would be contravened by compelling the employment of undocumented aliens was rejected because, while such individuals have no right to be in this country, federal law does not forbid the employment of undocumented aliens (*id.* at 1391-92), and, while a California statute purports to do so, that statute is in "limbo," its enforcement having been enjoined by state courts pending a final determination of its constitutionality (*id.* at 1392-94).[7]

Two other Courts of Appeals, in decisions since *Grace*, have upheld arbitration awards as not violating public policy in circumstances similar to the instant case, albeit without fully articulating their view of the scope of the

---

[7] The pending petition for certiorari in *Bevles* does not seek a resolution of the circuit conflict discussed in the instant petition but rather challenges the correctness of the Ninth Circuit's understanding of the federal and state laws respecting undocumented aliens. Similarly, the pending petition for certiorari in *Keystone Consolidated Industries, Inc. v. International Union, United Automobile Workers*, No. 86-406—seeking review of a Seventh Circuit decision enforcing an award requiring an employer to contribute to a pension fund despite the employer's having secured a contribution waiver under ERISA, *Local 449, UAW v. Keystone Consolidated Industries, Inc.*, 793 F.2d 810 (7th Cir. 1986)—does not seek resolution of the circuit conflict discussed in the instant petition, but rather seeks review of the Seventh Circuit's determination that there is no conflict between the arbitration award in that case and ERISA. We believe the instant petition to be the only one now before the Court seeking a resolution of the circuit conflict over the scope of the public policy exception announced in *Grace*.

"public policy" exception. *Premium Bldg. Products Co. v. United Steelworkers*, 616 F. Supp. 512 (N.D. Ohio 1985), *aff'd*, 798 F.2d 1415 (6th Cir. 1986) (reinstatement of employee discharged for smoking marijuana at his workplace); *Super Tire Eng. v. Teamsters Local Union No. 676*, 721 F.2d 121, 125 n.6 (3rd Cir. 1983), *cert. denied*, —— U.S. ——, 105 S. Ct. 83 (1984) (reinstatement of employee discharged for repeatedly consuming liquor during working hours).[8]

C. In *E.I. DuPont, supra*, Judge Easterbrook, in a concurring opinion that agreed with the result but not the reasoning of the majority, provided the most extensive demonstration that the understanding of the "public policy" exception adopted by the District of Columbia and Ninth Circuits is sound in principle and accords with *Grace* whereas the contrary view adopted by the First, Fifth and Seventh Circuits is unsound and inconsistent

---

[8] See also, *S. D. Warren Co. v. United Paperworkers Intern.*, 632 F. Supp. 463 (D.Me. 1986) (enforcing award reinstating employee discharged for possession of marijuana on employer's premises; court expressly disagrees with decision of Fifth Circuit in the instant case); *Schmidt v. Republic Airlines*, 630 F. Supp. 1303 (D. Minn. 1986) (enforcing award reinstating airline maintenance supervisor discharged for being accomplice to cocaine smuggling); *Peabody Coal Co. v. United Mine Workers*, 120 LRRM 2270 (S.D. Ohio 1985) (enforcing award reinstating employee discharged for stealing employer's porperty); *Wyman-Gordon Co. v. United Steelworkers of America*, 613 F. Supp. 626 (N.D. Ill. 1985) (enforcing award reinstating employee discharged for fraudulently collecting unemployment benefits while working for the employer).

And see, the following appellate decisions pre-dating *Grace* in which arbitration awards were upheld despite "public policy" contentions: *Local 453, Internat'l U. of E., R. & M. W. v. Otis Elevator Co.*, 314 F.2d 25 (2d Cir. 1963) (Marshall, J.), *cert. denied*, 373 U.S. 949 (1963) (reinstatement of employee convicted of running gambling operation on employer's premises); *International Ass'n of Mach., Dist. No. 8 v. Campbell Soup Co.*, 406 F.2d 1223 (7th Cir. 1969), *cert. denied*, 396 U.S. 820 (1969) (*same*); *Kane Gas Light and Heating v. Intern. Broth., etc.*, 687 F.2d 673 (3rd Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983) (reinstatement of utility employee who closed main valve and thereby cut off gas service to entire borough).

with *Grace*. Because we cannot improve on Judge Easterbrook's analysis, we quote it at some length:

> "Public policy" is an ambiguous term. A court that sets aside an arbitrator's award could mean: "Whether or not the award carries out the contract, there is a rule against this outcome." An arbitrator's reinstatement of white employees in preference to identically-situated black employees would violate public policy in this sense. . . .
>
> * * *
>
> Public policy is used in [another] way when a court claims the right . . . to decide whether an award cuts at cross purposes with a policy the court thinks valuable. If an arbitrator reinstates an employee caught using drugs, the court may say that this undermines the public policy of deterring the use of drugs, so the award cannot stand. [Citing the decision below in the instant case]. . . .
>
> The court today approves this [latter] inquiry in principle, although it disagrees with the district court's implementation of the principle. I find the principle itself objectionable. A power to set aside awards on grounds of public policy, as distinct from rules of law, is too sweeping. A court lacks this power for the same reason the arbitrator does—the function of arbitrator and court is to carry out a contract, and contracts bind unless made unlawful by rules of positive law. [790 F.2d at 617-18.]

Judge Easterbrook went on to observe that if an employer decided on its own to retain an employee who had committed offenses of the type involved in *DuPont* (or the type involved here), "no public policy would stand in the way," and the same would be true if an employer agreed in express terms with a union to retain such an employee. *Id.* at 619. And the "public policy inquiry should be the same whether the arbitrator is applying an express clause of the contract or applying a general one (such as 'just cause') that he has made concrete." *Id.*

Judge Easterbrook offered one further reason for objecting to the "loose use of 'public policy' to set aside an [arbitration] award": such a use "conflicts with a *real* public policy, one expressed in positive law"—the policy favoring enforcement of arbitration awards that faithfully implement the parties' intent (790 F.2d at 618 (emphasis in original)). Judge Easterbrook elaborated:

> [E]nforcement of the award turn[s] on the meaning of the contract, not on equitable notions about public policy. If the contract violates a rule of law, then the contract itself must be set aside. . . . But if the contract is lawful, and the arbitrator follows or interprets the contract within his authority, the court "must grant . . . an order" enforcing the award. [790 F.2d at 618] [9]

---

[9] Of course, under the view of the "public policy" exception championed by Judge Easterbrook a public policy pertinent to employment *is* manifested by a law forbidding the employment of certain persons in certain occupations. Some such statutes do exist, and an arbitration award directing reinstatement that would contravene such a law would be unenforceable under this theory because such an award would command conduct forbidden by law. See, *e.g.*, *American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983) (vacating award that ordered reinstatement of employee whose employment was barred by federal statute); *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122, 125 (5th Cir. 1983) (vacating award that ordered reinstatement of employee whose employment was apparently barred by federal regulations).

The court below reasoned that the "public policy" being enforced here is likewise rooted in positive law: the Louisiana criminal law forbidding possession of marijuana (App. 7a). But as other courts have recognized, the public policy expressed in the criminal laws is vindicated through enforcement of those laws, and does not dictate the non-employment of criminal offenders. *Local 453, Internat'l U. of E., R. & M. W. v. Otis Elevator Co.*, 314 F.2d 25, 28-29 (2d Cir. 1963) (Marshall, J.); *International Ass'n of Mach., Dist. No. 8 v. Campbell Soup Co.*, 406 F.2d 1223, 1227 (7th Cir. 1969). If the state has not forbidden the continued employment of such criminal offenders, there is no employment-related "public policy" required by the rulings of the District of Columbia and Ninth Circuits and championed by Judge Easterbrook.

D. The existence of a conflict among the circuits on a recurring issue under § 301 is, of course, reason enough to warrant plenary review by this Court. But the need for prompt review is magnified by the deleterious effect on the national labor policy that results from the existing conflict.

Under the legal standard adopted by the First, Fifth and Seventh Circuits, arbitration awards may be set aside even though the action commanded by the awards is lawful. Whether a given award *will* be set aside depends upon the courts' evaluation of "public policy" criteria which, because not grounded in positive law, cannot be predicted by the parties with any degree of accuracy. In these circumstances, there is strong temptation for the losing party in arbitration to resist acceptance of the award and to shop for a favorable judicial decision based on "public policy." In the area of discharges alone, cases involving, *e.g.* marijuana possession, liquor consumption, gambling, and illegal alien status have become prime vehicles for appeals to "public policy" in resistance to awards directing reinstatement. And, of course, the problem is not confined to awards in discharge cases, as the decisions in *National Ass'n of Letter Carriers* (*supra*, p. 11, n.6), *Keystone* (*supra*, p. 12, n.7) and *Grace* itself reflect. The substantial volume of decided cases in the past three years is but the tip of the iceberg, for like cases are now pending throughout the country in great number.

One Court of Appeals has expressed "[c]oncern . . . that some companies nowadays are trying to reduce the credibility of unions by dragging out the grievance process through challenges in court to arbitration awards." *Ethyl Corp. v. Steelworkers*, 768 F.2d 180, 188 (7th Cir. 1985) (Posner, J.); *see also Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1168 (7th Cir. 1984); *cf. Graphic Communications Union v. Chicago Tribune Co.*, 779 F.2d 13, 16 (7th Cir. 1985). Regardless of the disposition of any particular "public

policy" challenge to an arbitration award, it is indisputable that the national labor policy is damaged by lack of finality and the delay that attends the *efforts* to secure judicial overturning of such awards. And where the effort succeeds, there is both a direct injury to the arbitral process in that case and an example that will encourage the filing of more such cases in court. Indeed, the extent to which the court below has gone in the instant case (refusing to enforce an award of reinstatement because the employee had nonusable traces of marijuana in his car) inevitably serves as a signal that a broad degree of judicial creativity is available to those who resist compliance with arbitration awards. That invitation wll not go unheeded.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

LYNN AGEE
MARK BROOKS
3340 Perimeter Hill Drive
Nashville, Tennessee 37211

MICHAEL H. GOTTESMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
DAVID SILBERMAN
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:
ROBERT H. URANN
Gardner, Robein & Healey
3540 Severn Avenue
Metairie, Louisiana 70002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 84-4727

MISCO, INC.,
Plaintiff-Appellees
v.
UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, and QUACHITA LOCAL 654,
Defendants-Appellants.

Aug. 19, 1985

Appeal from the United States District Court
for the Western District of Louisiana

Before GEE, TATE, and HIGGINBOTHAM, Circuit Judges.

GEE, Circuit Judge:

In today's case we review a determination by the district court that the award of an arbitrator contravenes well-defined public policy and hence should not be enforced.

In the course of an opinion perhaps most kindly described as whimsical,[1] the arbitrator noted the following

---

[1] The opinion observes at its outset, for example: "The Arbitrator informed the parties that he is a Creek American Indian." This curious item is matched by equally curious reasoning. At one point, for example, the arbitrator criticizes the employer for not having the investigation of Cooper's incident conducted by "some higher, detached Company official," notwithstanding that it was

facts, among others, as established by the evidence that he heard. The employer's plant, where grievant Cooper worked, had a drug and drinking problem. The night shift in particular, of which Cooper was a member, had experienced problems with production and accuracy not encountered by the day shift. At an employee meeting called for the purpose, the employer had emphasized its strong policy against possession or use of drugs or alcohol on its premises. Cooper was aware of the employer's long-standing rule against bringing such substances onto plant premises or consuming them there.

Cooper's job was to operate an unusually dangerous machine called a slitter-rewinder, which cuts rolling coils of paper by means of sharp blades and which had caused numerous injuries. Operating such a machine with judgment and coordination impaired by substance abuses creates a safety hazard to the operator and to other employees. Cooper had been twice reprimanded for shoddy, inattentive work—the very type the employer believed might be attributable to such abuse—the last time on the day before the events leading to his discharge.

On the day in question, January 21, 1983, police searched Cooper's home under a warrant, finding several bags of marijuana, marijuana cigarettes, cigarette papers, and a weighing scale. While this was being done, another police officer had Cooper's automobile under surveillance on the plant parking lot. About 6:30 p.m., during shift working hours, Cooper and two companions came out of the plant and two or more of the three entered Cooper's car momentarily. The three then walked a short distance to another car and entered it. Some time later, the other two men returned to the plant, leaving Cooper sitting in

---

directed by the president of the company, assisted by the production supervisor. At another, he concludes that the employer's immediate discharge of Cooper for drug use was not reasonable because another stated ground for discharge was unauthorized reading on duty.

the back seat of the car. He was apprehended there by police, with marijuana smoke in the air and a lighted marijuana cigarette in the front-seat ash tray.

Cooper refused to say who had been with him in the car, persistently denied that he had been using the drug—although found breathing its smoke—and at the arbitration hearing testified falsely under oath (so the arbitrator found) that he had not been in the car when apprehended but standing elsewhere in the parking lot. A search of his own car on the lot revealed a plastic scales case containing marijuana residue, although the employer did not know this last when it discharged him. On these facts, unaccountably reciting that "the Company has not proved by any level of evidence that the Grievant was in violation of the [substance abuse] Rule," the arbitrator directed the reinstatement of Cooper with full back pay, seniority, and so forth.[2] The district court, in main reliance on our decision in *Amalgamated Meat Cutters v.*

---

[2] This baffing view of evidence that would with ease have sustained a civil verdict and probably a criminal conviction is perhaps partially explained by the circumstance that, by his academic degrees, the formal training of the arbitrator, a Dr. Milden J. Fox, Jr., was as an engineer and not as a lawyer. He seemed especially impressed, for example, by the fact that there was no direct testimony that anyone in the car where Cooper was found was *seen* to light a cigarette, and "it would have been difficult for [the surveilling officer] not to have seen someone light a cigarette. . . ." We can only view the quoted phrase as indicating doubt about whether there indeed *was* a lighted cigarette in the car, which in other portions of his writing the arbitrator treats as established: "The only thing that the Company has proven is that the Grievant was sitting in the back seat of a car in which there was found a lit marijuana cigarette in the front seat ashtray. . . ."

We note in passing that, although lacking personal experience in such matters, we had thought it common knowledge that the narcotic effect of marijuana can be obtained by simply sitting in a small enclosure where smoke from it is present. It is not clear from the record whether or not the car windows were closed, but—given that the incident occurred on an evening in late January—it is a reasonable inference that they were.

Great Western Food Co., 712 F.2d 122 (5th Cir. 1983), set aside the arbitrator's award as against well-defined public policy—the Louisiana law against possession of marijuana and the public policy, embodied in the employer's rule, against introduction of drugs into the work place and consequent operation of dangerous machinery by persons under their influence.

In *Amalgamated Meat Cutters*, a driver who admitted having been drinking had wrecked his employer's truck and was consequently discharged. The arbitrator, in an award reminiscent of the one we contemplate today, ordered his reinstatement because the employer failed to disprove to his satisfaction the driver's claim that equipment failure caused the wreck. As the district court noted, speaking of *Amalgamated* in its opinion in today's case:

> The district court enforced the arbitrator's award and the Fifth Circuit reversed. The basis of the appellate court's ruling was that the arbitrator's award violated "the public policy of preventing people from drinking and driving. . . ." *Amalgamated Meat Cutters, supra*, at 125. The court specifically found that the policy was sufficiently well defined and definite because the policy against drunk driving is "embodied in the case law, the applicable regulations, statutory law, and pure common sense. . . ." *Id.* In reaching this decision, the court noted:
>
> > In a nation where motorists practically live on the highways, no citation of authority is required to establish that an arbitration award ordering a company to reinstate an over the road truck driver caught drinking on duty violates public policy. Alcohol impairs a person's coordination, and inhibits his ability to reason rationally. Ingestion of alcohol slows the reflexes. It induces drowsiness. It slows response time to external stimuli. It dulls the senses. In

> recognition of alcohol's undisputedly debilitating characteristics, every state in the union prohibits driving while under its influence. A driver who imbibes the spirits endangers not only his own life, but the health and safety of all other drivers. These considerations are convincing enough with respect to drivers of automobiles. They become even more compelling when the driver is regularly employed to course the highways in a massive tractor-trailer rig.

Id. at 124.

The same can be said of the intoxicating effects of marijuana. Similarly, an operator of a dangerous piece of industrial equipment can be said to present the same danger to himself and to his co-employees as an operator of a tractor-trailer rig does to fellow motorists. The Union argues that *Amalgamated Meat Cutters* can be distinguished from the instant case in that the truck driving employee admitted having consumed alcohol before the wreck. It is true that Cooper has consistently denied using or bringing marijuana onto Misco's premises; nonetheless, the arbitrator's findings of fact clearly indicate that the brown plastic case found in Cooper's car contained marijuana. Notwithstanding this fact, and the inferences to be drawn from it, the arbitrator still found that Cooper should be reinstated. It is true that the company did not know of the officer's discovery until shortly before arbitration began, but the real issue in this case is not when the company learned of the incident, but whether reinstatement is appropriate at this point.

We agree with Judge Stagg that *Amalgamated Meat Cutters* controls this case. In it we held that whether or not the wreck in question was caused by the driver's admitted consumption of spirits on the job, "[t]o enforce the arbitrator's award in this case, an award which com-

pels the reinstatement to driving duties of a truck driver who admittedly drank while on duty would violate . . . public policy." 712 F.2d at 125. Thus the employer's procedural omission to rule out mechanical failure as the proximate cause of the wreck simply did not matter.

In today's case, although Cooper denied it, the arbitrator found that—contrary to Cooper's untruthful testimony—he was apprehended on company premises in an atmosphere of marijuana smoke in another's car and marijuana was found in his own car on the company lot. The pertinent company rule, promulgated pursuant to a collective bargaining agreement provision permitting the company to impose rules,[3] provides, under the heading CAUSES FOR DISCHARGE:

> Bringing intoxicants, narcotics, or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics, or controlled substances.

The rule draws no distinctions between "residue" and "usable quantities," nor need it do so. Yet, although Cooper violated it, the award directs his reinstatement at work on the slitter-rewinder. This is contrary to *Amalgamated Meat Cutters*, in which there was no finding that the driver was drunk, only that he had taken a drink on the job. In adopting plant rules, an employer is not narrowly limited to denouncing acts already made criminal by the law but may, at a minimum, adopt reasonable prophylactic measures going beyond the statutes. As examples, we think it scarcely open to doubt that rules forbidding the introduction of drug paraphernalia onto plant premises (with or without the accompanying drugs) or firearms (loaded or not) would be valid—and the

---

[3] A portion of the collective bargaining agreement reserves to management the right "to unilaterally establish, modify, and enforce the plant rules or regulations and/or disciplinary procedures, policies and practices; . . . ."

former a valid expression of the policy which we have discussed. If so, it follows that a rule forbidding the introduction on plant premises of marijuana in any quantity whatever would be equally so.

The arbitrator in today's case, focusing chiefly on his conception of "industrial due process," ruled for Cooper in great part because the employer did not at the time it discharged him *know* of the marijuana residue that he undeniably brought onto the plant parking lot. That his ruling was in the teeth of the other evidence recited we need not further belabor, for that is not the point.

Rather, it is that his narrow focus on Cooper's procedural rights has led him to enter an award directing the employer to put Cooper back to operating a hazardous machine, dangerous to himself and to others, at a time when the arbitrator knew that in fact Cooper *had* brought drugs onto company premises, in violation of Louisiana law and of a clearly-stated company rule. The public policy involved today is the same as that we relied on in *Amalgamated Meat Cutters:* one against the operation of dangerous machinery by persons under the influence of drugs or alcohol. Gazing at the trees, and oblivious of the forest, the arbitrator has entered an award that is plainly contrary to serious and well-founded public policy.

Such an award overrides the employer's attempt to protect the safety of its employees, including Cooper, in the name of safe-guarding Cooper's abstract procedural rights against a determination by the employer that the arbitrator knew was in fact true: that Cooper *did* bring marijuana onto his employer's premises. Indeed, even had the arbitrator not known of that fact at the time he entered his award, it is doubtful that the award should be enforced today in light of what is now known.

The judgment of the district court declining to do so is

AFFIRMED.

TATE, Circuit Judge, dissenting.

I respectfully dissent. Despite the brilliant caricature by the majority of the lay arbitrator's decision, the arbitrator's opinion squarely decides the only arbitral issue presented—whether Cooper, the discharged employee, had been wrongfully discharged for sitting in a car in which *another* employee was smoking marijuana, for the alleged violation of a rule that prohibited the employee himself from bringing or consuming marijuana on the plant premises—and squarely finds that Cooper himself had not violated the company rule.

Essentially questioning these arbitral findings, the majority nevertheless finds it to be against public policy to enforce this arbitral award. In support of this holding, the majority not only relies upon its disagreement with the arbitrator's reasoning, but it also relies upon the circumstance that a non-usable trace of marijuana had been found on a scale in the employer's car (for which no criminal charges had ever been filed)—a fact unkown to the employer at the time of the discharge, and one which the arbitrator found to be inadmissible as post-hoc jusitfication for the discharge that was based on another cause (aside from the issue of whether a non-usable trace of marijuana (verifiable as such only by microscopic or chemical analysis) in an employee's car constituted a violation of the company rule against bringing marijuana on the premises).

In their zeal to correct what the majority feels is a mistaken and misreasoned arbitration decision, my conscientious brethren of the majority, I fear, have (for reasons to be stated in parts I and II below) ignored controlling principles of the extremely limited permissible judicial review of such awards, and the extremely limited circumstances in which courts may deny enforcement of them. Absorption into the federal courts of greater power to review arbitration awards flouts the national policy favoring contractual resolution of disputes between

management and employees and disfavoring detailed judicial monitoring of dispute-resolution under arbitration agreements.

The brilliant and plausible majority opinion does not discuss the governing principles. Perhaps too lengthily, therefore, I will attempt to set them forth and to state how, in my view, the majority erred in failing to apply them in this case.

I.

Under settled principles by which judicial review of arbitration awards is "sharply circumscribed", *Local Union 59, International Brotherhood of Electrical Workers v. Green Corporation*, 725 F.2d 264, 268 (5th Cir. 1984), we cannot question (a) the arbitrator's factual evaluation of the evidence before him as not proving that Cooper possessed or used marijuana on the plant premises, (b) the arbitrator's interpretation of the contractual provision as not providing grounds for discharge if Cooper was in a vehicle where someone else was smoking marijuana, or (c) the arbitrator's procedural ruling that evidence unknown to the employer at the time of the discharge, but subsequently discovered by him, was not probative of the issue before the arbitrator as to whether at the time of the discharge the employer had a contractually valid cause to discharge Cooper. *Id.*, citing and quoting from the *Steelworker's Trilogy: United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers of America v. Warrier & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

These decisions hold that courts may not review an arbitrator's factual findings or merit determinations and that courts must enforce an arbitrator's award unless "[1] the dispute was not 'arguably arbitrable,' [2] . . .

the arbitral decision did not draw its essence from the collective bargaining agreement, or [3] . . . enforcement of the award by the court would violate public policy." *Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO, Local Union 540 v. Great Western Food Company*, 712 F.2d 122, 123-24 (5th Cir. 1983) (citations omitted).

Thus, whether we are inclined to agree with the arbitrator's rulings or whether, instead, we think they are strained, is immaterial for purposes of judicial review. For these purposes, the arbitrator's factual finding is conclusive on the courts that Cooper did not possess or use marijuana on the plant premises, or bring it onto them.

II.

In its refusal to enforce the arbitrator's award, the district court did not disregard these principles. Rather, it refused to afford judicial enforcement of the arbitrator's award on the ground that its enforcement would be contrary to public policy, a holding affirmed by the majority. In so doing, the district court relied only upon the evidence that the arbitrator had refused to consider: that in Cooper's car in the plant's parking lot had been found the brown plastic case containing gleanings determined, on laboratory analysis (eight months later) to be marijuana. The district court concluded that this possession of marijuana not only constituted a violation of criminal law but also of "the company's rule barring introduction of intoxicants into the work place—a rule that is designed to effectuate the public policy against unsafe operation of heavy equipment by a worker whose judgment has been impaired by intoxicating substances."

Had the evidence in the arbitration proceeding clearly shown possession of usable marijuana or its use on the plant premises, the district court's and the majority's characterization of public policy reasons for non-enforcement of the award would be persuasive. However,

although undoubtedly a public policy reason supports non-use of marijuana (legally prohibited), no public policy authority is cited to us that an employee who uses marijuana or alcohol in his off-duty hours is unemployable or is without more subject to discharge for such non-employment-related use; however condemnable we might feel is such off-duty conduct by the employee. *Cf., e.g., Johns-Mansville Sales Corporation v. International Association of Machinists, Local Lodge 1609*, 621 F.2d 756 (5th Cir. 1980) (enforcing arbitrator's award that order-[ed] reinstatement of employees discharged for smoking on company property, despite rejected public policy argument that smoking increases health hazards in the work environment).

In *W.R. Grace and Company v. Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983), the Supreme Court ordered enforcement of an arbitrator's decision, rejecting strong public policy arguments that to enforce the award would penalize the employer for its prior compliance with an earlier district court judgment (which subsequently had been reversed on appeal). The Court agreed that "a court may not enforce a collective bargaining agreement that is contrary to public policy" and that "[f]f the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it." 461 U.S. at 766, 103 S.Ct. at 2183. In rejecting a public-policy-based denial of enforcement, the Court stated that, for public policy reasons to justify the judiciary to deny enforcement of an arbitration, the public policy "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal principles and not from general considerations of supposed public interests.'" *Id.*

In finding in the present case that the public policy exception justified denial of judicial enforcement of the

arbitrator's award, the district court (as does the majority) principally relied upon *Amalgamated Meat Cutters, supra*, in which we noted that "[a] court should exercise extreme caution before declaring that an arbitral award violates public policy," 712 F.2d at 124, but nevertheless denied enforceemnt of "the arbitrator's award in this case, an award which compels the reinstatement to driving duties of a truck driver who admittedly drank while on duty," on the ground that enforcement would violate the well defined public policy "of preventing people from drinking and driving," 712 F.2d at 125.

In *Amalgamated Meat Cutters*, the arbitrator had specifically found that the discharged truck driver (involved in an accident in which his eighteen-wheel rig had overturned) had been drinking on the trip while driving his truck at work. (The arbitrator had nevertheless ordered reinstatement, on the ground that the employer had failed to disprove that a steering mechanism failure, rather than the driver's drinking, had caused the accident.) Distinguishably from the case now before us, however, in *Amalgamated Meat Cutters* the arbitrator had specifically found that the truck driver *on the job* engaged in hazard-creating conduct in violation of public policy (although nevertheless, on technical reasons, the arbitrator had ordered reinstatement).

In the present case, the enforcement of the arbitrator's award would not, under the principles of extremely limited judicial intervention with regard to arbitration awards, violate the public policy "against unsafe operation of heavy equipment by workers whose judgment had been impaired by intoxicating substances," relied upon by the district court. The evidence of marijuana traces found in Cooper's car does not establish either that Cooper used marijuana while performing work for Misco or that his judgment during work was impaired by intoxicating substances. The arbitrator found, moreover, that Cooper neither used nor possessed, nor was under the influence

of, marijuana at work. And the traces found in Cooper's car, even if considered by the arbitrator, would not, without more, lead to a contrary result, any more than an empty beer can in an employer's car would prove that he had been drinking on the work premises rather than elsewhere.

Amalgamated Meat Cutters, supra, is thus clearly distinguishable. The discharged employee there was actually consuming liquor while performing his job as a truck driver. Reinstatement would therefore have violated the public policy against drinking while driving. In this case, however, even though possession of marijuana violates *a* public policy, *see* La. Rev. Stat. Ann. 40:966(D), we cannot say that reinstatement of an employee in whose car were found non-employment-related traces of marijuana would violate any "well defined and dominant" public policy against using or being under the influence of marijuana *while at work.*

Conclusion

For the reasons assigned, therefore, I respectfully dissent. In violation of settled principles limiting judicial intervention in employment-dispute resolution through arbitration, the majority errs in refusing to accept the facts of non-violation found by the arbitrator, simply because it disagrees with the arbitrator's reasoning, and in refusing to enforce the arbitral award based upon purely rhetorical reasons of public policy beyond the facts actually found in the arbitration record.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4727

MISCO, INC.,
Plaintiff-Appellee,
versus

UNITED PAPERWORKERS INTERNATIONAL UNION,
AFL-CIO and QUACHITA LOCAL 654,
Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC
(JUNE 3, 1986)

Before GEE, TATE and HIGGINBOTHAM, Circuit Judges

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing

en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

* * * *

ENTERED FOR THE COURT:

/s/ Thomas A. Gee
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 83-2904

MISCO, INC.

versus

UNITED PAPERWORKERS INTERNATIONAL UNION,
AFL-CIO, and its QUACHITA LOCAL 654

MEMORANDUM RULING

(Filed Oct. 3, 1984)

Not content with the arbitrator's ruling, plaintiff now seeks to have the award of the arbitrator vacated. The parties agree that the court's federal question jurisdiction is properly founded upon the Labor Management Relations Act, 29 U.S.C. § 185(a). In responding to the complaint, defendant counterclaimed, asking the court to enter a judgment enforcing the arbitration award and assessing attorney's fees and costs against plaintiff for acting unreasonably and in bad faith in refusing to abide by the award of the arbitrator.

Relying on the factual record created by the arbitrator's opinion, the parties have filed cross motions for summary judgment. For the reasons set forth below, the Misco motion for summary judgment is GRANTED.

The case *sub judice* had its origin in an incident which occurred on January 21, 1983. On that date, a Misco employee, Isiah Cooper (Grievant), was arrested, while at work, for possession of marijuana. At all pertinent times, Grievant was a member of defendant's Union. This incident led to Grievant's discharge on February 7, 1983. The grievance was processed through all requisite administrative steps and was ultimately submitted to an arbitrator. A hearing was held before the arbitrator on September 26, 1983. The arbitrator then issued a 33-page opinion on October 31, 1983. In that opinion, the arbitrator found that the employer lacked just cause to dismiss Grievant under the terms of a collective bargaining agreement in force at the time of plaintiff's discharge.

Plaintiff now moves to have the arbitrator's order vacated, arguing that the arbitrator exceeded his authority, ignored highly probative facts, and ruled in violation of public policy. Defendant, on the other hand, contends that the traditional deference accorded to arbitration awards should require the court to honor that award.

The relevant facts, as found by the arbitrator, are as follows: Misco operates a paper converting facility. Hazardous industrial equipment is crucial to the operation of this facility. Grievant was employed as a slitter/rewinder operator. This machine is considered particularly hazardous because it features sharp edges required to cut rolling coils of paper. The danger inherent in operation of this machine has resulted in 10 to 15 accidents over the past four years at the Misco facilities. The company contends that the use of intoxicants impedes the judgment and coordination of hazardous equipment operators, thus increasing the likelihood of accidents. For this reason, the company has a strong policy which prohibits the possession or use of drugs or alcohol on company premises. The company has taken repeated steps to ensure its employees understand the necessity for

the policy. Under the collective bargaining agreement, one of the reasons for discharge of an employee is violation of Rule ii(1), which states:

> Bringing intoxicants, narcotics or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics or controlled substances.

In the months preceding January 1983, the company had experienced difficulty with violations of this rule. Specifically, Misco's personnel had found empty beer cans, whiskey bottles, and the remains of marijuana cigarettes on company premises.

Apparently, the company felt that it was having serious production problems and drug and alcohol problems on the second shift, the one on which Grievant worked. Whether justified or not, management believed that the two problems were intricately related. To combat the problem with the use of intoxicants, the company held employee meetings stressing the prohibition against use or possession of drugs or alcohol on company premises. In addition, management made spot checks on the second shift to find violators, and the production manager lived in a trailer on the plant premises during the week in an effort to observe offenders violating the rule. On two occasions prior to January 1983, Grievant had been reprimanded for producing paper rolls not sized according to specification.

On the night of January 21, 1983, Monroe police, acting pursuant to a search warrant, searched Grievant's home. The officers found two and a half bags of marijuana, five marijuana cigarettes, weight scales and marijuana cigarette paper. Shortly thereafter, Officer Frank Bougere was sent to an area near Misco's premises to keep Grievant's car under surveillance in the event Grievant attempted to flee. Bougere did not know Grievant, and

had been told that he was a large black man. Bougere located Grievant's car from a license number given to him. Bougere stationed himself approximately 100 yards from Grievant's car, a 1973 Grand Prix. Using binoculars, Bougere observed the following events:

At approximately 6:30 p.m., the officer saw a group of men leave the plant and walk to Grievant's car. Bougere later learned that one of the men was the Grievant. Upon reaching the Grand Prix, two of the men entered the car and remained for a few moments. The group then proceeded from the Grand Prix to a white Cutlass. Three of the men, one of them Grievant, got into the Cutlass and remained until other police officers arrived. At this point, the other two men besides Grievant left the car and went back to the plant. Grievant then was arrested for possession of marijuana found in his apartment. After his arrest, one of the officers located a lit marijuana cigarette in the ashtray of the car. During the company's investigation of this incident, Grievant denied having been in the car or ever having used or possessed marijuana on company premises.

Shortly after his arrest, Grievant signed a consent to search form authorizing the Monroe police officers to conduct a search of his car. The search revealed a brown plastic weight case which contained shreds of vegetable matter later identified as marijuana. Company officials did not become aware of the discovery of marijuana in Grievant's car until shortly before the arbitration proceeding.

On April 12, 1983, Grievant entered a plea of guilty to a charge of possession of marijuana in the Fourth Judicial District Court, Ouachita Parish, Louisiana. As a result of this incident, the company conducted an investigation which ultimately led to Grievant's discharge in February of 1983.

As a matter of federal policy, arbitration is to be favored over judicial resolution of disputes similar to the one in this case. *United Steelworkers v. American Manufacturing Company*, 363 U.S. 574, 80 S.Ct. 1343, 4 L.Ed. 2d 1403 (1960).

In certain limited circumstances, judicial enforcement of the arbitrator's award is not required. Specifically, an award that is contrary to law or public policy need not be enforced. *Sea Land Service v. International Longshoremen's Association*, 625 F.2d 38 (5th Cir. 1980); *Johns-Manville Sales v. International Association of Machinists*, 621 F.2d 726 (5th Cir. 1980); *Amalgamated Meatcutters* v. *Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983). Before rejecting an arbitrator's award on the basis of policy considerations, the Supreme Court has explained that:

> Such a public policy, however, must be well defined and dominant, and is to be ascertained by 'reference to the laws and legal precedent and not from general considerations of supposed public interest.'

W. R. Grace & Co. v. Locan Union 759, 103 S.Ct. 2177 (1983), *citing Muschany v. United States*, 324 U.S. 49, 66, 65 S.Ct. 442, 451, 89 L.Ed. 744 (1945); *Amalgamated Meatcutters, supra.*

In the present case, the Union relied most heavily on the general principle that arbitrator's awards should be upheld as a matter of general federal policy. The core of plaintiff's argument is, however, that this preferred federal policy should not override matters of general public policy which are abridged by an arbitrator's award. The court finds *Amalgamated Meatcutters* to be the most persuasive in disposition of this case. In that case, defendant discharged its employee after he wrecked the company's tractor-trailer rig. The employee contended the discharge was without just cause, and pursued the matter through arbitration. The arbitrator ruled that

the employee should be reinstated. At the arbitration hearing, the arbitrator found that the police officer investigating the accident smelled liquor on the employee's breath; moreover, employee admitted to the police officer he had been drinking during his last rest stop. The district court enforced the arbitator's award and the Fifth Circuit reversed. The basis of the appellate court's ruling was that the arbitrator's award violated "the public policy of preventing people from drinking and driving. . . ." *Amalgamated Meatcutters, supra*, at 125. The court specifically found that the policy was sufficiently well defined and definite because the policy against drunk driving is "embodied in the case law, the applicable regulations, statutory law, and pure common sense. . . ." *Id.* In reaching this decision, the court noted:

> In a nation where motorists practically live on the highways, no citation of authority is required to establish that an arbitration award ordering a company to reinstate an over the road truck driver caught drinking on duty violates public policy. Alcohol impairs a person's coordination, and inhibits his ability to reason rationally. Ingestion of alcohol slows the reflexes. It induces drowsiness. It slows response time to external stimuli. It dulls the senses. In recognition of alcohol's undisputedly debilitating characteristics, every state in the union prohibits driving while under its influence. A driver who imbibes the spirits endangers not only his own life, but the health and safety of all other drivers. These considerations are convincing enough with respect to drivers of automobiles. They become even more compelling when the driver is regularly employed to course the highways in a massive tractor-trailer rig.

Id. at 124.

The same can be said of the intoxicating effects of marijuana. Similarly, an operator of a dangerous piece

of industrial equipment can be said to present the same danger to himself and to his co-employees as an operator of a tractor-trailer rig does to fellow motorists. The Union argues that *Amalgamated Meatcutters* can be distinguished from the instant case in that the truck driving employee admitted having consumed alcohol before the wreck. It is true that Cooper has consistently denied using or bringing marijuana onto Misco's premises; nonetheless, the arbitrator's findings of fact clearly indicate that the brown plastic case found in Cooper's car contained marijuana. Notwithstanding this fact, and the inferences to be drawn from it, the arbitrator still found that Cooper should be reinstated. It is true that the company did not know of the officer's discovery until shortly before arbitration began, but the real issue in this case is not when the company learned of the incident, but whether reinstatement is appropriate at this point.

Aside from the general policy considerations explained above and which are embodied in the company's rules, marijuana possession is specifically prohibited by law. La. R.S. 40:966(D). By being in possession of marijuana on company premises, Cooper violated clearly established law as well as the company's rule barring introduction of intoxicants into the work place—a rule that is designed to effectuate the public policy against unsafe operation of heavy equipment by workers whose judgment has been impaired by intoxicating substances. Moreover, *Amalgamated Meatcutters, supra,* serves as ample legal precedent to support the conclusion that well-defined, clear public policy exists, which favors prevention of occupational accidents through the prohibition of the use of debilitating substances in the work place. For this reason, the court concludes that the claims of the Union must be REJECTED, and its motion for summary judgment will be DENIED. Conversely, the motion for summary judgment filed on behalf of Misco will be GRANTED and the award of the arbitrator will be set aside.

An Order consistent with the terms of this Memorandum Ruling shall issue herewith.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 2nd day of October, 1984.

/s/ Tom Stagg
TOM STAGG
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
WESTERN DIVISION

Civil Action No. 83-2904

MISCO, INC.

versus

UNITED PAPERWORKERS INTERNATIONAL UNION,
AFL-CIO, and its OUACHITA LOCAL 654

ORDER

[Filed Oct. 3, 1984]

Based upon the reasons expressed in the foregoing Memorandum Ruling,

IT IS ORDERED that the motion for summary judgment filed on behalf of the defendant is hereby DENIED.

IT IS FURTHER ORDERED that the motion for summary judgment filed on behalf of Misco, Inc. is hereby GRANTED, and the award of the arbitrator is hereby SET ASIDE.

DATED AND SIGNED at Shreveport, Louisiana, this 2d day of October, 1984.

/s/ Tom Stagg
TOM STAGG
Chief Judge

APPENDIX D

Reference: 83K/16718

IN THE MATTER OF ARBITRATION BETWEEN

MISCO, INC.
MONROE, LA.

AND

UNITED PAPERWORKERS INTERNATIONAL UNION
LOCAL NO. 654
W. MONROE, LA.

DISCHARGE: ISIAH COOPER

Hearing was held in the Conference Room of Company's Counsel, tenth floor, Ouachita National Bank Building, Monroe, LA on Monday, September 26, 1983. The parties gave their permission for the Hearing to be tape recorded and used for educational purposes. The Arbitrator informed the parties that he is a Creek American Indian. The witnesses were sworn individually just prior to testifying. The Grievant was represented by his own attorney who assisted the Union International Representative who presented the Union's case. Prior to the close of the oral portion of the Hearing all parties, including the Grievant, were given an opportunity to add anything further they so desired. The Grievant took advantage of this opportunity. The Grievant was further asked if he felt that he had received a full and fair Hearing and if he felt the Union had properly represented him. He answered in the affirmative to both questions. The Hearing was considered closed upon receipt of the

post-Hearing briefs by the Arbitrator, namely October 21, 1983.

ARBITRATOR: Milden J. Fox, Jr., P.E., Ph.D., Professor of Industrial Engineering, selected by the parties under the procedures of the FMCS.

* * * *

STIPULATIONS

The parties stipulated the following:

1. The grievance is properly before the Arbitrator and he has the power under the Contract to make an Award that is final and binding on the parties.
2. The two week requirement that the Arbitrator has to make the Award is waived in favor of the Arbitrator getting the Award out as soon as possible.
3. The Company did not know about the gleanings found in the Grievant's car by Detective Toney on 1-21-83 until 9-21-83.

STATEMENT OF THE ISSUE

The parties agreed upon the following Statement of the Issue:

> Did the Company have just cause to discharge the Grievant under Rule II.1? If not, what if any should be the remedy?

GRIEVANCE

The grievance (JE-2A) dated 2-7-83 states the following:

> *Contract Reference*: Work Rules
>
> *Nature of Grievance*: Unjustified Termination
>
> *Settlement Desired*: Re-instate and make whole for all losses

The third step grievance procedure (JE-2B) states the following:

Meeting was held on Mon. 2/14/83 at 4:30 p.m. to establish proof as to the reason why Isiah Cooper was terminated. Present were Otha Pittman (sic), Isiah Cooper, Horace Curry, Fred Billhorn, Biff Meredith, Charles Covington and two police officers who arrested Cooper on company property on Fri. Jan. 21. Isiah Cooper violated company rules in being in a car with a lit marijuana cigarette. This was a direct violation of company rules as outlined in present work contract of having an illegal substance on company property is subject to immediate termination. Management was asked to provide sufficient evidence at this hearing and are satisfied that they did. The two police officers testified that Cooper got out of the car where they found the lit marijuana cigarette.

ss Charles Covington
Production Manager
2/14/83

CONTRACT

The Contract between the parties (JE-1) is effective from March 30, 1981 through March 30, 1984. The parts relied upon by the parties are as follows:

ARTICLE IV
MANAGEMENT RIGHTS RESERVED

1. Subject to the expressed provisions of this collective bargaining agreement, the Company reserves and retains, solely and exclusively, all its inherent rights to manage the business as such rights existed prior to the execution of this Agreement. *The Company shall have the full and exclusive* authority to determine and direct the policies, procedures and methods of operating its business. Without limiting the generality of the foregoing, the management rights not abridged by this Agreement include, but

are not confined to, the right to determine and from time to time, to redetermine the number, types and locations of its operations, and the methods, equipment, and processes to be employed; to discontinue or automate methods, equipment, process or operations, the right to determine the qualifications for new employees and to select its employees; to determine standards of production and the size and composition of its work force; to determine production and shipping schedules and methods of shipping and production; to determine the number and type of equipment, machinery, materials and supplies to be used or operated and the products to be manufactured, processed or sold or the services to be rendered or supplied; to hire, promote, transfer and assign employees to work; to reprimand, discharge or otherwise discipline employees; to determine job content and the amount and type of work needed; to determine and make the assignments of work; to schedule the hours and days and breaks and number of breaks and to determine the number of hours and days to be worked in each job in each shift; to discontinue or to transfer, assign or subcontract all or any part of its business operations to be performed by any outside person, firm or corporation whatsoever, selected by the Company in its sole discretion subject to the provisions of Paragraph 3 of this Article, to expand, reduce, alter, combine, transfer, assign or cease any job, job classification, department or operation; to determine the amount of supervision necessary; to control and regulate or discontinue the use of supplies, equipment, machinery and processes and any other property owned, used, leased, or possessed by the Company; to unilaterally establish, modify, and enforce the plant rules or regulations and/or disciplinary procedures, policies and practices; to introduce new, different, or improved methods, means and processes of transporta-

tion, production, maintenance, service and operation; and, otherwise, generally to manage the plant and direct the work force; the Company's failure to exercise any function or right in any particular way shall not be deemed a waiver of its rights to exercise such function or right, nor to preclude the Company from exercising the same, in some other way not in conflict with the express provisions of this Agreement.

2. The above enumerated rights of management are not all inclusive, but indicate the types of matters which belong to and are retained by the Company.

3. Except as specifically abridged, delegated, granted or modified by this Agreement, or by any supplementary agreements that may be made hereinafter, all of the rights, powers and authority of the employer existing prior to the signing of this Agreement are retained by the Company and remain exclusively and without limitation within the rights of management. It is understood however, that work customarily assigned to members of the bargaining unit shall only be contracted out in cases of emergencies or overflow conditions and that it is not intended that subcontracting of work shall result in the lay-off of employees within the bargaining unit.

4. Union stewards and local union officers employed by the Company are subject to the same discipline as any other employee covered by this agreement for violation of the Company's rules and regulations.

5. When a written reprimand or statement against an employee is to be entered in his disciplinary record, the Company will furnish him with a copy of the same and require him to sign that he has received it. Failure to acknowledge receipt of such statement shall constitute just cause for discharge. In arbitration cases reprimands shall not be con-

sidered cumulative if more than one (1) year apart, but all reprimands shall remain permanently in the employees file.

ARTICLE XI
MAINTENANCE OF DISCIPLINE

1. The Union agrees to cooperate with the Company in maintaining proper discipline and compliance with the plant rules and regulations. The Company shall retain the right to establish, maintain, enforce, rescind, amend or change rules and regulations regulating the discipline or discharge of employees and the procedures for issuance of reprimands and other forms of discipline. Plant rules will be posted and a copy sent to the local Union before posting. The Union may challenge any plant rule within fifteen (15) days after such posting, only on the basis of fairness and necessity of such plant rule, however, plant rules will be effective immediately upon posting and remain in effect until ruled on by grievance and arbitration procedures as to fairness and necessity.

2. The Union agrees to cooperate with the Company in maintaining and improving the quality of work, operating efficiency, safety and production in the Company's operations. Recognizing that the welfare of the employees and their opportunities to maintain and improve their livelihood depend upon the efficiency in the Company's operations, and consistent with the principle of a fair day's work for a fair day's pay, the Union hereby pledges for itself and all of its members that they will perform their work effectively and efficiently to the best of their ability, and that they will wear all items of safety clothing and equipment required by the Company. In order for the Company to maintain the highest

possible volume of production and quality of service, the Union will do all in its power to combat practices which impede or interfere with these objectives.

The Company Rules (or Work Rules) are JE-3. The rule involving the instant grievance is as follows:

CAUSES FOR DISCHARGE

II.

1. Bringing intoxicants, narcotics, or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics, or controlled substances.

BACKGROUND

The instant case is between Misco, Inc. (hereinafter referred to as the Company or Management) and the United Paperworkers International Union AFL-CIO, Ouachita Local #654 (hereinafter referred to as the Union). The Company feels that certain background events and policies of the Company are important to the consideration of the instant case. The Company is in the paper converting industry. They take roll stock and finish it in sheets or circles for the packaging industry. Hazardous equipment and machinery is in use in the industry, such as the slitter-rewinder which the Grievant operated. Because of the hazardous nature of this type of equipment, the industry generally and the Company are rated with high premiums for workman's compensation insurance. The Grievant's machine in particular is considered to be hazardous because of the sharp edges used to cut rolling coils of paper. According to the Com-

pany's post-Hearing brief, there have been 10 to 15 accidents on the slitter-rewinder over the last 4 years, a record which very clearly demonstrates the hazardous nature of the slitter-rewinder.

According to the Company, the use of drugs or alcohol impair the judgment and coordination of operators of such hazardous equipment, creating a safety hazard to themselves and to other employees. Because of this, Management says it has taken a strong position against the possession or use of drugs or alcohol in the plant or on Company premises through the publication of rules, employee meetings, and other notices or bulletins to the employees.

The Company Rules (JE-3) have been in effect for 9 or 10 years. The rule involved in this proceeding, which is listed as one of the causes for discharge is Rule II. 1, hereinafter referred to as the Rule, which states as follows:

> Bringing intoxicants, narcotics, or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics, or controlled substances.

According to the Company's post-Hearing brief, the employees have been fully aware of the Rule and it has been uniformly enforced and other employees have been discharged for violations of the Rule. At the Hearing the Company President testified that the Rule was enforced and that an employee had been discharged recently at the Greenville plant for violation of the Rule; however, no evidence was presented to support this testimony.

Prior to the events leading up the discharge in the instant case, the Company found evidence on the premises that drug or alcohol use could be taking place in violation of the Rule. The Company's testimony was that

the Company had found empty beer cans, whiskey bottles, and marijuana cigarette roaches on Company premises in the months prior to the Grievant's arrest on January 21, 1983. Additionally, Management received reports from Foremen that they had smelled smoke on the premises, but had never seen anyone smoking marijuana.

In an effort to stop the drug and alcohol use, an employee meeting was held in mid 1982 at which time employees were cautioned about the violations of the Rule prohibiting the possession or use of alcohol or drugs on the premises.

The Grievant worked on the night or second shift. There was uncontradicted testimony that the second shift had problems with production and quality that were not found on the first shift. Examples of production or quality problems were that the employees would cut paper with the wrong width or that wrong diameter cubes would be utilized. According to the Company's post-Hearing brief, these are typical problems of accuracy and fine judgment.

The Grievant, according to the Company, was having serious performance problems. On August 5, 1982 the Grievant was reprimanded and his pay was reduced to the 120 day rate for 20 working days as a disciplinary measure (CE-8). The reprimand stated that the Grievant had to learn to read and fix production orders correctly and that it was his responsibility to achieve the Company's production standards. The reprimand admonished the Grievant to "turn yourself around and mold yourself into the top-notch rewinder operator that you are capable of becoming."

On January 20, 1983, one day before his arrest, the Grievant received a written reprimand which put him on a 90-day probationary period, commencing January 13, 1983, for running five sets of material of the wrong width. The reprimand stated that "[D]uring this time

your work performance, attitude and productivity will be monitored very closely. Your continued employment with this Company is in your hand, as one more mistake such as this will result in your being removed from this machine permanently" (CE-9).

Thus, before the events of January 21, 1983 involving the Grievant's arrest for possession of marijuana at his home and his alleged possession on the Company parking lot, the Company felt it had a drug and alcohol problem on the night or second shift. The Company held employee meetings concerning the problem and called attention to the prohibitions of the Company rules against use or possession on Company premises. Further, Management officials made spot checks on the second shift in an effort to find offenders. During the week, the Production Manager lives in a trailer on the plant premises and frequently attempted to surprise employees in the act of violation of the Rule. Further, the second shift was evidencing problems of accuracy and production which the Company felt were attributable to the prohibited use of drugs or alcohol. More particularly, the Grievant had been reprimanded in 1982 and was placed on probation in January 1983, for 90 days because of the very type of accuracy problem that the Company felt might be attributable to the prohibited use of alcohol or drugs on the premises.

A warrant was obtained by the police to search the Grievant's house on Friday, January 21, 1983. McClanahan, Toney, other officers and a narcotics dog searched the Grievant's house and found 2½ bags of marijuana, five marijuana cigarettes, weight scales and marijuana cigarette paper. At the time of the house raid, Officer Frank Bougere was sent to the area of the Company to keep the Grievant's 1973 Grand Prix under surveillance, in the Company parking lot, so if the Grievant tried to get away during the house search, he could be detained until other officers arrived. About 5:30

p.m. Bougere drove through the Company parking lot and located the Grievant's car from the license number given him. Bougere did not know the Grievant on sight other than he was a large black man. After locating the Grievant's car, Bougere took a surveillance position direction across from the Company parking lot in an abandoned service station, some 100 yards from the Grievant's car. There are lights in the parking lot but no one that testified could remember if the lights were operating at the time. For example, the lights, according to the Company, were not working at the time of the arbitration Hearing. Bougere was using binoculars in his surveillance operation; but could not remember anything about them.

Around 6:30 p.m. Bougere saw some men come out the West door to the plant, the door that exits to the parking lot, turn to the right and walk towards the end of the lot where the Grievant's car was parked. This was some seven or more parking spaces from the door. Among the men walking alongisde the building was a large man he later identified as the Grievant. When the group got to the Grievant's car (it was backed into its parking space), according to Bougere at least two of the men got inside the car for a few minutes. At this point, Bougere thought the Grievant might possibly be getting ready to leave the plant so he notified the house raiding team of same. The men in the Grievant's car subsequently got out and walked back towards the plant door to a white 1975 Cutlass belonging to George Williams. According to Bougere, the white Cutlass was located about two car lengths from the Grievant's car. He did not recall seeing an identical black 1975 Cutlass backed into a parking space two spaces over from the white Cutlass as indicated by Union testimony. Also according to Union testimony, the white Cutlass was also backed into its parking space and the Grievant's car was two spaces over from the black Cutlass.

Officer Bougere continued watching the group of men walk back towards the plant door. When they got to the white Cutlass, he said that three of them entered the Cutlass with the man, later identified as the Grievant, getting in the back seat. The Cutlass was a 2-door model. With the position that Bougere testified he had, the location of the white Cutlass in the parking lot, and the way the car was backed into the parking slot, Officer Bougere was looking directly into the front windshield of the white Cutlass. It should be noted that Officer Bougere never testified that at any time during his surveillance did he see anyone light a cigarette, in particular, not one of the three men seated in the white Cutlass. Nor did he testify to anyone passing a cigarette to another person. The three men remained in the white Cutlass until Bougere and the other officers drove up. There were a total of six officers involved with the "bust."

When the police drove up some time around 6:30 p.m. the men in the white Cutlass got out of the car and two of them went back into the plant. For some reason the Grievant did not do so. Officer McClanahan, who appeared to be in charge of the operation, did not know the Grievant on sight, so Bougere went into the plant to see if he could locate the Grievant, which he failed to do and consequently returned to the area of the white Cutlass. When Bougere returned to the parking lot the Grievant had been apprehended and Bougere saw the lit marijuana cigarette in the right hand door of the white Cutlass' ashtray. The white Cutlass was searched but no marijuana, other than the lit cigarette, was found. One of the three police officers who testified said that another officer found a bottle of liquor in the white Cutlass but nothing was further said or done about this find although having liquor on Company property is also a violation of the Rule. Both Bougere and McClanahan testified they smelled marijuana aroma (smoke) in the white Cutlass.

According to Al Calloway, he was setting in the black Cutlass (his car) and the police questioned him as to the car ownership and then did not have anything further to do with him. The police did not mention even talking to Calloway.

The Grievant signed a consent for the police to search his car. Officer Toney searched the Grievant's car and found a plastic scales case with gleanings of alleged marijuana. Toney sealed these items in a bag and they were placed in the Metro Narcotics Evidence Room where it remained until 9/21-83. Toney did not bother telling anyone about the gleaning of alleged marijuana, but they were contained in his report of the incident. These items were found when the Company Attorney and one of his associates went to police headquarters to go over the case in preparation for the instant Hearing. In the process of going through the Grievant's police file (with the proper approval) with the two Company Attornies, Officer Toney found his record of the gleanings found in the Grievant's car on January 21, 1983. The gleanings were submitted to the North Louisiana Criminalistics Laboratory and a report was received dated 9/21/83 (CE-5) indicating that the substance was in fact marijuana. The cigarette found in the white Cutlass was also submitted to the same laboratory and a report was received on 2/4/83 (CE-4) indicating that the cigarette was marijuana.

The Grievant, along with some other fellow Company employees, claimed that they were standing behind the black Cutlass between the white Cutlass and the Grievan't car when the police made their raid on the Company parking lot. Calloway also testified that the Grievant and Bobby Brown were standing behind his black Cutlass when the bust went down.

The Company allegedly knew nothing about the arrest of the Grievant on January 21, 1983 which seems rather strange in that the night Foreman knew that the bust was going down, but he specifically stayed away from

the activity. In fact, the man was not even at the arbitration Hearing to testify as to what he knew about the situation. Al Calloway testified that he went back into the plant after his break was over and told the night Foreman, Jerry Ewing, about the bust in the parking lot. Ewing just walked off and never went outside to find out what was going on. The Plant Manager also testified that Ewing told him the bust went down during the 6:30 to 7:00 p.m. break and he, Ewing, was back in the plant doing some paper work, loading a truck, or something and did not know anything was transpiring until the police officer(s) came into the plant to apprehend George Williams, the owner of the white Cutlass. It was shown that Williams was across the street at the 7-11 convenience store during the bust.

According to the Production Manager, he heard of the parking lot bust on Sunday, January 23, 1983. On Monday he had a conference with the Grievant. The Grievant told the Production Manager that he had been arrested for possession of marijuana at his home. Furthermore, that he, the Grievant, had never possessed marijuana or used it on the Company premises. The Production Manager did not pursue the matter further at the time.

Misco's President, Fred Billhorn, first learned on January 27, 1983 that there had been a marijuana cigarette in the car in which the Grievant was sitting on January 21st. Billhorn received word that Officer McClanahan wanted him to get in touch with him about a drug problem at the plant. Billhorn testified that he telephoned McClanahan on January 27th and was advised about the marijuana cigarette found in the car with the Grievant and the Grievant's refusal to tell who the other two employees were that the police were unable or did not bother to apprehend. The police admitted that at the time of the bust they were only interested in the Grievant and not anyone else. One officer even testified he had never arrested anyone for smoking marijuana. The officers

later made a sweep of the plant trying to identify the other two men in the white Cutlass. They saw some individuals who might have been the two, but they could not make a positive identification.

As a result of this conversation with McClanahan, Billhorn launched an investigation of the situation. Covington was out of town on January 27th, but when Covington telephoned the plant on January 28th, Billhorn advised him of McClanahan's revelation that the Grievant was in a car on the parking lot with two other employees and a lit marijuana cigarette. When Covington returned to Monroe on the afternoon of January 28, 1983, the management team met and they decided to have a meeting with the Grievant and some other employees they thought might have been involved.

On January 31, 1983, according to Covington, Covington and Billhorn met with the Grievant and fellow employees Al Calloway, Bobby Brown and George Williams. The employees were advised that there was abuse of Rule three with the lit marijuana cigarette in the white Cutlass and that the Company was going to get to the bottom of it and the guilty parties had best go ahead and resign. This was the second meeting with the Grievant about the events of January 21, 1983.

Later that same day, Billhorn and Covington met with all of the employees and warned them about the problem that had been reported to the Company. The employees were reminded about the existence of the Company policy of immediate discharge for employees who are under the influence of or who possessed illegal drugs or alcohol on the Company premises.

After the general employee meeting on January 31, 1983, Billhorn and Covington had a third interview with the Grievant about the situation. They went over the allegations made by Officer McClanahan, but the Grievant again assured the Company representatives that he had

not possessed or used marijuana on the premises. He denied being in the white Cutlass and would not identify the other two men in the Cutlass.

Around February 1 or 2, Billhorn began trying to reach local Union President Otha Pittman. Pittman and Billhorn discussed the situation and Pittman began his own investigation. After investigating, Pittman contacted Billhorn and advised him that the Grievant had denied the allegations against him.

The decision to terminate was made on Friday, February 4, 1983, by Management after a review of all the facts including the Grievant's prior work record and the investigation. The Grievant was actually terminated on Monday, February 7, 1983, on which day he filed the grievance in evidence as JE-2A.

On April 12, 1983, in the Fourth District Court, Parish of Ouachita, State of Louisiana Court of Honorable Lemmie D. Hightower, Judge, #M:50489, the Grievant pled guilty to possession of Marijuana (CE-1). On April 14, 1983 in Judge Hightower's Court (# M:50489) the Grievant received ". . . a fine of $450.00 and costs, default 60 days (CE-2)." On February 9, 1983, before the above Judge Hightower, Mr. Robert Johnson, Assistant District Attorney for Ouachita Parish, Monroe, Louisiana, made the following statement:

> Your Honor, that . . . we declined prosecution with respect to a marijuana cigarette that was found in his constructive possession, but we are still evaluating the file to determine whether or not we're going to charge the other marijuana that was seized pursuant to a search warrant of Mr. Cooper's home.

On 2/4/83 the Grievant was denied unemployment compensation by the State of Louisiana. On 5/5/83 the disqualification for benefits was reversed on appeal (docket M 465 AT 83) by Lindle Stewart, Appeals Referee. On 8/5/83 the Decision of the Board of Review denied the

Company's appeal of the reversal of the 5/5/83 disqualification of the Grievant for unemployment benefits. The Board denied the Company's appeal based on the failure of the Company to file its appeal on time (timelineness). The Company maintained that they mailed the appeal timely, but the Board lost the appeal. The Board stated in UE-4 that the appeal from the Company was received on June 16, 1983 but that the Company's appeal rights expired May 20, 1983.

Pursuant to the grievance submitted by the Grievant (JE-2A) on 2/7/83, the instant Hearing has resulted.

POSITION OF THE PARTIES

Company:

The Company submits that just cause under any standard of proof was established and that its discharge of the Grievant should be sustained. In the alternative, if the Arbitrator should not so find, the Company strongly submits that the Grievant should not be reinstated or given backpay or any other remedy in this proceeding because of the subsequently discovered evidence clearly demonstrates his unfitness for employment, as related at the arbitration Hearing.

Union:

It is the Union's position that the action taken by the Company was unreasonable in light of the facts in the case.

1. The Grievant was never charged in connection with a marijuana cigarettee found on Company property in a white Cutlass Oldsmobile.
2. The Company, although given opportunity, did not seek corroborative proof.
3. There was no witness who observed the Grievant smoking a marijuana cigarette.

4. The Company failed to offer substantive proof to State of Louisiana Security Tribunal.

Basically, the Company acted prematurely on advice of Monroe Police Department who dropped their case like an egg on the Company's head. The Company should have deferred judgement on discharge until the State decided if enough evidence warranted moving forward with the case against the Grievant.

The Grievant should be reinstated and made whole for all losses.

OPINION

In the area of discharge or discipline, it is incumbent upon the employer to prove guilt of wrong doing and particulary so when the Contract requires "cause" or "just cause" for the discharge. Furthermore, the degree of proof in an ordinary discharge or discipline arbitration case is generally the "preponderance of evidence" rule. "Proof beyond a reasonable doubt" is normally required only in those disciplinary cases where an employee is charged with acts of moral turpitude.

The employee's past record is often a factor in the determination of the proper penalty for the offense. It is further a recognized principle in arbitration that there must be reasonable rules, uniformly applied, and adequately disseminated. "Just cause" requires that employees be informed of a rule, the infraction of which may result in discharge.

When Management fails to post Plant rules, its freedom of action may be more restricted than had the rules been posted. As a result, Management is burdened with a greater necessity to prove the absence of discrimination in the discipline of an employee. This is especially true should Management opt to apply a rule that would invoke discharge as the penalty for violation. Under these conditions there should be no doubt in the minds of the employees as to the existence and nature of the

rule. Furthermore, failure to conduct a fair investigation or interrogate the Grievant before reaching a decision to terminate him violates the principal of industrial due process.

Evidence concerning the giving of warnings of unsatisfactory conduct prior to discharge is germane in deciding if the penalty is justified. When an employee continues prohibited conduct after having been warned, the fact that he was warned will stand against him.

In the area of burden of proof or burden of the affirmative, the Company has the initial burden to justify its action. Once this burden has been shouldered, the burden of the affirmative passes to the Union which must, if it is to prevail, etiher successfully refute the Company's case of establishing "just cause" or else prove mitigating circumstances.

Unions benefit from due process by being able to protect and serve their members. Management also benefits from due process in at least four ways. The first is that in making and enforcing disciplinary policy, its supervisors or managers have to think realistically about the types of behavior that truly harm the Company's operations, and the types that do not. Second, supervisors answerable for their acts, have a stake in getting workers to participate in setting standards of behavior in social interaction at the workplace. Third, the possible monitoring of the Contract with the grievance procedure forces supervision to appraise the thrust and impact of Union demands and weigh the implications of the Company's acts and policies. Fourth, there is created the necessity of a complete record that will show and support the Company's action(s) in the event an impartial third party is called upon to hear the case and make a final and binding decision.

The normal criteria for a discharge or discipline to meet the usual "just cause" are (58 LA 599 and 64 LA

110), which are based on the questions set forth by Arbitrator Daugherty in an appendix to *Enterprise Wire Co.*, (46LA 359). The criteria is as follows:

1. The employee must be forewarned.
2. Employer's position with respect to employee's conduct was reasonable.
3. Employer investigated before discharge.
4. Investigation was fair.
5. Substantial evidence supports the charge against the employee.
6. There was no discrimination.
7. The degree of discipline was reasonably related to the nature of the offense and the employee's past record.

In arriving at his opinion this Arbitrator has listened to the tapes made of the Hearing, read the post-Hearing briefs, read all of the exhibits, and checked all of the citations listed in the briefs. The instant case will now be analyzed in light of the seven criteria and the information obtained from the above sources.

1. The Employee Must Be Forewarned

The Rule in question leaves no doubt as to the results of bringing narcotics to the plant, consuming narcotics at the plant, or reporting for duty under the influence of narcotics. There are specified as "Causes for Discharge in Work Rule II.1. which has been referred to throughout this Award as the Rule. The Company had testimony that it had held a meeting of the employees in 1982 and warned them of the Rule plus the Company's concern for the enforcement of the rule, namely the safety of employees. However, the Company did not say whether or not the Grievant was in attendance at the meeting. He may have been or he may not have been

in attendance. Throughout the Hearing and all of the meetings prior to and following the Grievant's discharge he maintained (1) that he had not smoked marijuana on Company property, and (2) that he had never brought any marijuana on Company property. Such vehement denial by the Grievant at all the meetings, all steps of the grievance procedure, and the arbitration Hearing can only lead the Arbitrator to the conclusion that the Grievant knew about the Rule and hence he was warned.

2. Employer's Position With Respect to Employee's Conduct Was Reasonable

Assuming that the Company proves that the Grievant violated the Rule by being in a car with a lit marijuana cigarette, namely possessing an illegal substance on Company property and furthermore that said conduct was subject to immediate discharge, then the Employer's position with respect to the employee's conduct was reasonable. However, it should be pointed out by the Arbitrator that Section II of the Company Rules (JE-3) does not say anything about immediate discharge. Section II only lists "Causes for Discharge." As an example, reading on duty except where required in line of duty is listed under Section II. Is this a cause for immediate discharge? It is difficult for this Arbitrator to see where both reading on duty and being involved with marijuana in the manner the Grievant is charged, have equal weight for immediate discharge. A weak "no" is forthcoming from this question.

3. Employer Investigated Before Discharge

This question along with Question No. 4 is the employee's "day in court." An employee should know the offense with which he is being charged and have the opportunity to defend his behavior. Furthermore, the Company's investigation should be made before its disciplinary decision is made. If the Employer fails to do

so, the failure may not usually be excused on the grounds that the Grievant will get his/her day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much polarization of the parties' positions. In a real sense, the Employer is obligated to conduct himself like a trial court.

In the instant case there are two questionable items in the Employer's investigation of the case. The first was the act or lack thereof of the night Foreman, Jerry Ewing. Part of Management's team, Jerry Ewing, was told that a bust was going down in the Company parking lot involving Company employees. He knew that his shift had been having all types of problems as set forth in the Background Section and, if the Company is to be believed that these problems could in fact be drug related. The employee who testified about telling Ewing of the bust further stated that Ewing just walked away when told of the bust going down. Even when the police came into the plant looking for George Williams, the owner of the white Cutlass, Ewing still refused to get involved in the matter, so much so that top Management did not know until the following week that a lit marijuana cigarette and a bottle of whisky (alcohol of some kind) was found in the white Cutlass. There is also the possibility that had Ewing gone to the scene of the bust as the activity was taking place, the other two men that were allegedly in the white Cutlass with the Grievant could have been identified. Also, the possibility of the second questionable event might not have occurred, namely the overlooking of the fact that Officer Toney found gleanings of marijuana in the Grievant's car on the night of the bust. As the situation now stands, no one with the Company or Union knew about the gleanings until 9/21/83, which was the date the Company Attorney found out about the item when he and Officer Toney inspected the Grievant's arrest record at Police Headquarters. The Union learned about the gleanings at the arbitration Hearing.

One of the rules in arbitration is that the Company must have its proof in hand before it takes disciplinary action against an employee. The Company does not take the disciplinary action and then spend eight months digging up supporting evidence to justify its actions. In addition, the use of the gleanings evidence prevented the Grievant from knowing the full extent of the charge against him. Who knows what action the Grievant or the Union would have taken if the gleanings evidence had been made known from the outset of the Company's investigation. It certainly appears probable to this Arbitrator that the Company would have had a good opportunity to find out about the gleanings evidence if Ewing had not taken the action he did on the night of the bust, namely nothing. As far as the Arbitrator can tell from the testimony present, Ewing never did notify his Management about the Friday night situation. The Plant Manager indicated he questioned Ewing about the events of 1/21/83, but Ewing said he was busy elsewhere in the plant and did not know anything about the situation.

There is a "no" answer, however weak, forthcoming from this question due primarily to the actions of Ewing and the gleanings evidence that was first brought up at the Hearing.

4. The Investigation Was Fair

During the investigation the Company official doing the investigation may be both the prosecutor and the judge, but he may not also be a witness against the Grievant. In addition it is essential for some higher, detached Company official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct. Had this action taken place in the instant situation, perhaps the detached Company official would have asked to see the Grievant's police report record and the gleanings situa-

tion would have been discovered and brought forth before the Grievant was discharged. Apparently, there was no hurry to discharge Grievant. After all, the bust took place on 1/21/83, and the Grievant was discharged on 2/7/83.

Again, there is a weak "no" answer forthcoming in answering this question.

5. Substantial Evidence Supports The Charge Against The Employee

The first question that arises is what should be the level of proof. It is this Arbitrator's opinion that the level of proof is not one requiring that the evidence be conclusive or "beyond reasonable doubt," but the level of evidence must be truly substantial and not flimsy.

The second question is was the Grievant in the white Cutlass at the time of the bust as the police testified or was he standing behind the black Cutlass as he and at least two other employees testified. This decision is a matter of credibility. In order to establish the credibility of one side or another, the testimony of both sides must first be analyzed. The police say the Grievant was sitting in the back seat of the white Cutlass. Two of the police did not know the Grievant on sight and did not have any interest in the case other than arresting the Grievant for possession of marijuana at his home. What then would the police gain by testifying that the Grievant was sitting in the back of the white Cutlass? Absolutely nothing. On the other hand, what would the Grievant gain if he were determined not to have been in the white Cutlass? That would mean he was not in an automobile in which a lit marijuana cigarette was found. In one case the individuals giving the testimony have nothing to gain while the opposing testimony comes from individuals who have everything to gain. As a result, the presumption is placed on the Grievant as the party that has to produce suffice evidence to avoid a ruling against his claim

that he was not in the back seat of the white Cutlass. The Grievant then has the "affirmative of the issue" which he has failed to carry in face of the testimony of the police.

Now that the Grievant has been placed in the back seat of the white Cutlass, the third question is, what direct evidence has the Company offered to indicate that the Grievant either possessed or smoked the marijuana cigarette found in the right hand door ashtray of the white Cutlass?

The gleanings found in the Grievant's car is not accepted as evidence in that the Company had access to the gleanings prior to the Grievant's discharge but failed to find out about them as indicated above. So what other evidence has the Company offered? For one thing, the Company admitted that the marijuana found at the Grievant's home had nothing to do with the Grievant's discharge. No policeman testified that he saw anyone smoking a marijuana cigarette or even any cigarette. Officer Bougere had the Grievant, and the other two men who were in the white Cutlass, under surveillance from the time they walked out of the plant's West door until the rest of the police arrived at the parking lot. During the time that Bougere was observing the three men in the white Cutlass, using binoculars, he was looking into the front windshield of the car in question. Bougere never testified that he saw any of the three men light a cigarette or pass a lit cigarette among themselves. It has been this Arbitrator's experience in other arbitration cases involving the smoking of marijuana, that the involved officer(s) testified to seeing either the marijuana cigarette lit and/or persons passing the marijuana cigarette back and forth between themselves. In addition, the officer(s) generally testified that a marijuana cigarette has a particular burning pattern in which sparks are given off. In other words, a marijuana cigarette could be easily identified by its burning pattern. As

stated before, Officer Bougere did not testify that he saw anyone lighting or smoking any type of cigarette. The time of day that the three men in the white Cutlass might have been smoking a marijuana cigarette was around 6:30 p.m. on 1/21/83. That time of year at 6:30 p.m. it is rather dark, especially inside a car, so that unless someone ducked down very low in the car, it would have been difficult for Officer Bougere not to have seen someone light a cigarette or pass it to another individual. Officer Bougere and McClanahan both testified that they smelled marijuana coming from the white Cutlass as they approached same as the three occupants got out of the white Cutlass and two of them walked back into the plant.

The police arrested the Grievant, as they intended, for possession of marijuana at his house. The police took the cigarette they found in the Cutlass and had it analyzed for marijuana, which it was, but they did not testify to making any attempt to obtain any finger prints from the marijuana cigarette.

Who brought the marijuana cigarette onto the plant? No one proved who did this although the Company admitted that it believed it was the Grievant that did so. However, believing and proving who brought the marijuana cigarette onto Company property are two different things and the Company has not proven that the Grievant was the guilty party by any amount of proof.

Was the Grievant guilty of smoking a marijuana cigarette on Company property? No one testified they saw the Grievant even smoking any kind of cigarette. The only thing that the Company has proven is that the Grievant was sitting in the back seat of a car in which there was found a lit marijuana cigarette in the front seat ashtray, a front seat just moments before vacated by another Company employee.

Even though not binding on the Arbitrator, the Assistant District Attorney chose to not prosecute the

Grievant with respect to the marijuana cigarette found in the white Cutlass. In addition, the Louisiana Unemployment Compensation Commission did not see fit to withhold unemployment compensation when the Company fired the Grievant for violation of the Rule.

The Arbitrator can only say that the Company has not proven by any level of evidence that the Grievant was in violation of the Rule. Again, the Arbitrator would say that had the night Foreman taken an active interest in and gone to the parking area while the bust was taking place, a different set of results might have come about.

There is a "no" answer forthcoming in answering this question.

6. There Was No Discrimination

The Company presented uncontroverted testimony in the President's single statement that the Rule had always been enforced. The Company did not present any specific evidence to support its contention. The Company also had testimony that one individual had been fired at the Greenville Plant. This testimony too was unsupported by any specific evidence. However, the Union did not challenge any of this testimony. On the other hand, the Rule is not restricted to narcotics, it also includes alcohol, which was found by the police in the white Cutlass. Nothing was presented by the Company about its actions in this matter. Again, had Ewing taken some action on the night of the bust perhaps the alcohol matter would also have received some attention. In spite of the Company's testimony, it would appear that the Company in the instant case was more interested in the narcotics issue than in the alcohol issue although there was considerable testimony about how both items probably were having detrimental effects on the Company's production.

The Arbitrator can only say again that there is a weak "no" answer forthcoming from this question.

7. The Degree Of Discipline Was Reasonably Related To The Nature Of The Offense And The Employee's Past Record

A Grievant's record of previous offenses may never be used to discover whether he/she was guilty of the immediate or latest charge. The only proper use of his/her record is to help determine the severity of discipline once he/she has been properly found guilty of the immediate offense.

The Arbitrator may be said to act as an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the Employer) was within the bounds of reasonableness above set forth. In general, the penalty of dismissal for a really serious first offense does not in itself warrant a finding of Management unreasonableness.

In the instant case, in view of the many "no's" forthcoming from the questions, there is also a "no" forthcoming from this question.

In light of the many "no" answers forthcoming from the seven questions, the Arbitrator can only say that the Company did not have just cause to discharge the Grievant under Company Rule II.1.

AWARD

The grievance is sustained. The Company is to restore the Grievant to his job and make him whole of any loss of earnings, seniority, or other fringe benefits. In making the monetary settlement, if the Grievant does not have to repay the unemployment compensation back to the State of Louisiana, the Company can deduct this amount from its financial obligation. Also, the Company can deduct from its financial obligations any monies the Grievant earned between the time he was discharged on 2/7/83 and the date he returned to work for the Company.

The Grievant has two weeks from the date of this Award to present himself to the Company as ready to go to work. The Company has two weeks to place the Grievant on his old job or an equivalent job for which the Grievant is qualified.

The Arbitrator retains jurisdiction for the settlement of the monetary issue only. In the event the parties are unable to agree on the monetary settlement, either or both may petition the Arbitrator to reopen the case for settlement of the monetary issue only.

If the Grievant fails to report to the Company as ready to go to work within the specified time limit he shall be deemed as having resigned from the Company effective 2/7/83, the original date of his discharge. Furthermore, at the time of his discharge the Grievant had been placed on probation for 90 days and was to be paid at the 120 day date (per CE-9) effective January 13, 1983. Since the Grievant was fired on 2/7/83, he had not completed the 20 working days at the 120 day rate so from 2/7/83 through 2/23/83 the Company's financial obligation is for this reduced rate. The 90 day probation is still in effect so that if the Grievant returns to work he still has the 90 day probation left to serve less the time from the probation inception (1/13/83) until the time of his discharge on 2/7/83.

/s/ M. J. Fox, Jr.
M. J. Fox, Jr.
P.E., Ph.D.

October 31, 1983

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-102

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO and QUACHITA LOCAL 654,
Applicants,

v.

MISCO, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including October 1, 1986.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 13th
day of August, 1986.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-102

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO and QUACHITA LOCAL 654,
Applicants,

v.

MISCO, INC.

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cases be, and this same is hereby, further extended to and including October 20, 1986.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 22nd
day of September, 1986.

Supreme Court, U.S.
FILED
DEC 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-651

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO and OUACHITA LOCAL 654,
Petitioners

v.

MISCO, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A. RICHARD GEAR
HUDSON, POTTS & BERNSTEIN
Post Office Drawer 3008
Monroe, Louisiana 71210
(318) 388-4400
Attorneys for Respondent Misco, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed parties have an interest in the outcome of this case.

MISCO, INC.

TABLE OF CONTENTS

	Page
Certificate of Interested Parties	i
Table of Authorities	iv
Summary of Argument	1
Argument	2
Conclusion	11
Appendix:	
Text Of Fifth Circuit Brief of Respondent, Pages 7-13	1a

TABLE OF AUTHORITIES

Cases	Page
Amalgamated Meat Cutters v. Great Western Food Co., 712 F.2d 122 (5th Cir. 1983)	10
American Postal Workers Union v. U.S. Postal Service, 789 F.2d 1 (D.C. Cir., 1986)	2
Bevles Co., Inc. v. Teamsters Local 986, 791 F.2d 1391 (9th Cir., 1986), pet. for cert. pending, No. 86-431	3
E.I. Dupont DeNemours v. Grasseli Empl. Assoc., 790 F.2d 611 (7th Cir., 1986), cert. denied, —— U.S. —— (Oct. 6, 1986)	2, 6, 8
W. R. Grace & Co. v. Rubberworkers, 461 U.S. 757 (1983)	4, 6, 8
Heard v. Hodge, 334 U.S. 35	6
Howard Press, 265 NLRB No. 181 (1982)	10
Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607, 100 S.Ct. 2844 (1980)	8
Laredo Coca-Cola Bottling Co., 258 NLRB No. 69 (1981)	10
Local One, Amalgamated Lithographers v. NLRB, 729 F.2d 172 (2nd Cir., 1984)	10
M.A.N. Truck & Bus Corp., 272 NLRB No. 201 (1984)	10
Misco, Inc. v. United Paperworkers International Union, 768 F.2d 739 (5th Cir., 1985)	2
NLRB v. Dixie Motor Coach Corp., 128 F.2d 201 (5th Cir., 1942)	10
Office and Professional Employees International Union v. Washington Metropolitan Area Transit Authority, 724 F.2d 133 (D.C. Cir., 1983)	3, 11
U.S. v. One 1977 Cadillac, etc., 64 F.2d 500 (5th Cir., 1981)	9
United States Postal Service v. American Postal Workers Union, 736 F.2d 822 (1st Cir., 1984)	5
United States Postal Service v. National Ass'n of Letter Carriers, 789 F.2d 18 (D.C. Cir., 1986)	3
United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)	11
World Airways, Inc. v. International Brotherhood of Teamsters, Airline Division, 578 F.2d 800 (9th Cir., 1978)	4, 11

TABLE OF AUTHORITIES—Continued

Statutes	Page
Louisiana Revised Statute 40:966(D)	2, 9
14 C.F.R. § 121.413(4) (ii)	4
Occupational Safety and Health Act, 29 U.S.C. § 651-678	2, 8, 9
Controlled Substance Act of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-651

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO and OUACHITA LOCAL 654,
Petitioners

v.

MISCO, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The Petition For Writ of Certiorari should be denied because no circumstances falling within the ambit of United States Supreme Court Rule 17 are shown to exist. There is no conflict among the Circuit Courts of Appeals in their application of the "public policy" exception when it is clear that the public policy involves matters of public safety. The decision below in Misco, Inc. was a proper exercise of the "public policy" exception in that the Occu-

pational Safety and Health Act, 29 U.S.C. § 651-678, the criminal laws of the State of Louisiana at Louisiana Revised Statutes 40:966(D), and the Controlled Substances Act of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 *et seq.* provide explicit public policy upon which to predicate the vacation of an arbitration award. Additionally, the arbitration award in this case was so irrational as to be arbitrary and capricious and does not merit the attention of the United States Supreme Court.

ARGUMENT

There Is No Conflict Among The Circuit Courts Of Appeal In Their Application Of The "Public Policy" Exception To Matters Of Public Safety

Respondent asserts that no conflict among the Circuit Courts of Appeals exists for the reasons set forth below. There is clearly no conflict when the issue is presented in terms of *public safety* as the public policy consideration. Further, under any view, the award would have required the employer to violate a law (The Occupational Safety and Health Act), and thus, the instant case would be in conformance with any definition of public policy.

Only two of the decisions of the Courts of Appeals relied upon by Petitioner in its quest for a conflict among the Circuits dealt with public policy insofar as it embodied considerations of *public safety.* The first case was the present case before the Court, *Misco, Inc. v. United Paperworkers International Union,* 768 F.2d 739 (5th Cir., 1985). The second case was *E. I. Dupont DeNemours v. Grasseli Emp. Assoc.,* 790 F.2d 611 (7th Cir., 1986) cert. denied, —— U.S. —— (Oct. 6, 1986), which was basically aligned with the *Misco* decision and is discussed below. The cases allegedly in "direct conflict" with the Misco public safety rationale involved nonanalogous issues of public policy. In *American Postal Workers Union v. United States Postal Service,* 789 F.2d 1 (D.C.

Cir. 1986), the arbitrator's award which was enforced involved not public safety, but reinstatement of a dishonest postal employee. In *Bevles Co., Inc. v. Teamsters Local 986*, 791 F.2d 1391 (9th Cir., 1986), pet. for cert. pending, No. 86-431, the arbitration award enforced by the Court involved the reinstatement of undocumented aliens, not public safety.

The undersigned has found no cases where the District of Columbia Circuit has considered public policy relating to *public safety* in the context of a suit to vacate an arbitration award. Moreover, the District of Columbia Circuit, in our view, does not limit the public policy exception to those cases where the award violates a law or compels unlawful actions. In *Office and Professional Employees International Union v. Washington Metropolitan Area Transit Authority*, 724 F.2d 133, at 140 (D.C. Cir. 1983), the District of Columbia Circuit stated, "Additionally, courts will not enforce an award that is contrary to law *or* explicit public policy." (Emphasis supplied) And admittedly that Circuit noted the narrow scope of the public policy exception in *United States Postal Service v. Nat. Ass'n of Letter Carriers*, 789 F.2d 18 (D.C. Cir., 1986), as discussed by Petitioner in footnote 6 at page 11 of its Petition. However, the Court then went on to *consider* the Postal Service's broader public policy argument that the Postal Service's operations "are not to be subjected to a patchwork of conflicting state laws." *Id.* at 20, 21. The Court stated:

> "The arbitrator's decision does not threaten to impair postal operations by subjecting the Postal Service to the dictates of all state and local laws. It applies one Tennessee statute to a small class of employees at one post office; it has no precedential value as an interpretation of the management rights clause . . . Thus, while we acknowledge the validity of the government's concern over the public policy ramification of allowing Postal Service operations to be impaired by conflicting state and local laws, we

conclude this policy is not implicated in the unique circumstances of the case." *Id.* at 20, 21.

Based upon the foregoing, it is submitted that the District of Columbia Circuit's treatment of the public policy exception is broader than merely the ascertainment of whether an award is unlawful or whether an award mandates illegal conduct and that no conflict among the Circuit Courts exists based upon any decision of the District of Columbia Circuit.

Moreover, the Ninth Circuit's decisions are not in conflict with *Misco, Inc.* The Ninth Circuit Court Of Appeals *has* considered public policy related to insuring the *safety of air travel.* It affirmed the vacation of an arbitration award which called for retraining and requalifying a pilot whose judgment had deteriorated to the point where he posed a threat to life. The case was *World Airways, Inc. v. International Brotherhood of Teamsters, Airline Division,* 578 F.2d 800 (9th Cir., 1978). This case predated this Court's decision in *W. R. Grace & Co. v. Rubber Workers,* 461 U.S. 757 (1983), which enunciated the "public policy" exception to enforcement of an arbitration award. In *World Airways,* the Ninth Circuit Court of Appeals looked to statutory and judicial recognition of the "duty resting upon air carriers to perform their services with the highest degree of safety in the public interest." 49 U.S.C. § 1421(b)(1970). It recognized that "regulations promulgated pursuant to the Federal Aviation Act established that it is the duty of the carrier to determine the competency of its pilots in the interests of public safety taking into account such things as 'personal characteristics that could adversely affect safety'." 14 C.F.R. § 121.413(4)(ii). It further noted that the Civil Aeronautics Board in an accident report stated that "Safety in air transportation requires the air carrier . . . to identify those pilots who are marginal or who demonstrated a failure to adhere to proven procedures and reassign them to duties compatible with their

capabilities and limitations." The Ninth Circuit also recognized that failure of an airline to comply with provisions of the Federal Aviation Act and its regulations can result in administrative and civil penalties. *Id.* at 803, The Court then stated:

> "Thus, federal law clearly places the responsibility upon the airline to determine whether or not a pilot possesses the judgment to serve as a Pilot-In-Command. The Arbitrator usurped this responsibility. Although the federal policy of resolving labor differences by arbitration is strong, there is also a strong federal policy in ensuring the safety of air travel. In weighing these concerns, we cannot overlook the horrible toll in human life that air crashes can take.
>
> After careful consideration of the briefs and oral argument, we hold that the District Judge has correctly balanced the competing federal interests here in determining that under these unusual circumstances, the Arbitrator exceeded his authority." Id. at 803, 804.

Based upon the foregoing it is clear that rather than being in conflict with the Fifth Circuit's holding in *Misco, Inc.*, the Ninth Circuit would applaud the reasoning of the Fifth Circuit.

The First Circuit case alleged by Petitioner to be aligned with the Fifth Circuit in a state of conflict with the District of Columbia Circuit and the Ninth Circuit did not involve public policy considerations of safety. Only the reinstatement of a convicted embezzler, not safety, was involved in *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir., 1984).

Public safety was considered as it pertained to the reinstatement of an employee who had had a mental breakdown and engaged in certain violent conduct in the Seventh Circuit case cited by Petitioner as aligned with the

Fifth Circuit. *E.I. Dupont DeNemours v. Grasseli Emp. Ass'n*, 790 F.2d 611 (7th Cir. 1986), cert. denied, —— U.S. —— (Oct. 6, 1986). The Seventh Circuit considered whether safety as a public policy should bar reinstatement of the violent employee. It assumed that workplace safety was a valid public policy and noted that the arbitrator had "explicitly considered danger to company employees and property but concluded that these dangers were not significant since the likelihood of a future mental breakdown by [the grievant] is remote . . .". It further stated that "we are not empowered to review either his factual finding that the liklihood of a future mental breakdown by [the grievant] is remote or his judgment that the remoteness of a future breakdown renders any possible danger to workplace safety inconsequential." *Id.* at 615. So rather than generating a "deleterious effect on the national labor policy" (see Petition For Writ at 16), the Seventh Circuit affirmed the conclusiveness of an arbitrator's findings of fact, thus *advancing* the national labor policy. It should be noted that in *E. I. Dupont*, the arbitrator considered the public policy issues related to reinstatement. In *Misco, Inc.*, the arbitrator *ignored* the employer's argument that reinstatement was inappropriate.

Thus, the Fifth, Seventh and Ninth Circuits have recognized that public safety is a valid public policy. Clearly, when the issue is presented in terms of recognition of *public safety* as public policy, no conflict exists among the circuits, and this Court should not grant the Writ.

The Misco Decision Was A Proper Exercise Of The "Public Policy" Exception

In *W. R. Grace & Co. v. Rubberworkers*, 461 U.S. 757 (1983), this Court stated, as noted by Petitioner, that ". . . If the contract as interpreted [by the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. *Heard v. Hodge*, 334 U.S., at

35. Such a public policy, however, must be well defined and dominant, and is to be ascertained 'by reference to the laws and general precedents and not from considerations of supposed public interests'." Citation omitted. 461 U.S. at 766.

Judge Tom Stagg in the Western District of Louisiana highlighted the company's rules prohibiting drug use or possession as a valid expression of public policy:

> "Misco operates a paper converting facility. Hazardous industrial equipment is crucial to the operation of this facility. Grievant was employed as a slitter/rewinder operator. This machine is considered particularly hazardous because it features sharp edges required to cut rolling coils of paper. The danger inherent in operation of this machine has resulted in 10 to 15 accidents over the past four years at the Misco facilities. The company contends that the use of intoxicants impedes the judgment and coordination of hazardous equipment operators, thus increasing the likelihood of accidents. For this reason the company has a strong policy which prohibits the possession or use of drugs or alcohol on company premises." (See Petitioner's Appendix C, at 17-a.)

The Company had a valid rule prohibiting the possession or consumption of intoxicants, narcotics or controlled substances on the plant premises and had experienced violations of this rule in the form of finding empty beer cans, whiskey bottles, and the remains of marijuana cigarettes on the company's premises. The company held employee meetings stressing the company's prohibition rule, made spot checks to find violators on the night shift, and the production manager lived on the premises to observe offenders. The grievant had been previously reprimanded for judgmental errors not uncommon for one under the influence of narcotics or intoxicants. (Petitioner's Appendix C, at 18-a.)

Thus, as noted in Misco's Brief to the United States Court of Appeals for the Fifth Circuit (Respondent's Ap-

pendix A, Argument portion of Fifth Circuit Brief), the company's policy and rules were in accord with the dictates of national safety policy as exemplified by the Occupational Safety and Health Act, 29 U.S.C., § 651-678, (OSHA) particularly Section 654, which states as follows:

> "(a) Each employer—
>
> (1) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
>
> 2) Shall comply with occupational and safety health standards promulgated under this chapter.
>
> (b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct."

The obvious application of OSHA to reinstatement awards in violation of public policy was also pointed out in *E. I. Dupont DeNemours v. Grasseli Emp. Assoc.*, 790 F.2d at 615. Thus, an employer's *duty* to provide a safe working environment as required by OSHA is a strong public policy and a strong law which would be contravened by the enforcement of an arbitration award which reinstated a rule-violating drug user, who had been reprimanded for judgmental errors, to operating hazardous equipment. Respondent submits that public safety is a public policy cognizable under *Grace* as a result of the clear congressional mandate of the Occupational Safety and Health Act. This Court recognized the important policies behind the enactment of OSHA in *Industrial Union Dept. v. American Petroleum Institute*, 448 U.S. 607, 100 S.Ct. 2844 (1980). Thus, reinstatement in this case would require the employer to take an action in violation of his obligation to provide employ-

ment "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654.[1]

Additionally, public policy is found in the criminal laws of the State of Louisiana at Louisiana Revised Statutes 40:966(D) which provide that the possession of marijuana is a crime punishable by fines and imprisonment ranging from six months for a first offense to twenty years on a third conviction.

Moreover, in addition to federal safety policy and state criminal policy, federal criminal policy prohibits the possession and use of controlled substances. The Controlled Substances Act was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub.L. 91-513, 84 Stat. 1242, 21 U.S.C. § 801 *et seq.* (1970), which was designed to strengthen law enforcement efforts in the ever expanding area of drug abuse. See *U.S. v. One 1977 Cadillac, etc.*, 64 F.2d 500, 502 (5th Cir., 1981). Federal policy as stated in the Controlled Substances Act at 21 U.S.C. § 801(2) is as follows:

> "The illegal importation, manufacture, distribution and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."

Clearly, explicit federal and state policy exists with respect to health and safety and is a valid basis for the exercise of the "public policy" exception by the Fifth Circuit Court of Appeals in *Misco, Inc.*

---

[1] If one assumes that reinstatement would be in breach of an employer's legal obligation under OSHA to provide a safe work place, the *Misco, Inc.* treatment of the "public policy" exception clearly falls within the narrow definition of the public policy exception urged by Petitioner, i.e., that the award must require violation of a law before the exception applies.

Recognition Of Public Safety As A Public Policy Exception Is In Accord With Federal Labor Policy

National labor policy upholds employer disciplinary efforts to prohibit the illegal use of drugs in the work place. The National Labor Relations Board consistently upholds employer efforts to discipline and discharge because of the illegal use of drugs, not withstanding allegations the discharges were motivated by union activities. See *M.A.N. Truck & Bus Corp.*, 272 NLRB No. 201 (1984); *Howard Press*, 265 NLRB No. 181 (1982); *Local One, Amalgamated Lithographers v. NLRB*, 729 F.2d 172 (2nd Cir., 1984); *Laredo Coca-Cola Bottling Co.*, 258 NLRB No. 69 (1981). See also *NLRB v. Dixie Motor Coach Corp.*, 128 F.2d 201 (5th Cir., 1942), cited by the Fifth Circuit in *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122 (5th Cir., 1983).

The Arbitrator's Award Was Fundamentally Irrational And Arbitrary And Does Not Merit The Attention Of This Court

The *Misco* award was so irrational that it does not merit the attention of this Court. The panel opinion below noted that the arbitrator's opinion was "perhaps most kindly described as whimsical." (Petitioner's Appendix A, at 1-a). The Court noted the irrationality of the arbitrator's opinion in that "The arbitrator informed the parties that he is a Creek American Indian.", and in that he criticised the employer for not utilizing "some higher, detached company official" to investigate the incident, completely ignoring the fact that the investigation was directed by the President of the company, and assisted by the Production Supervisor. The arbitrator's award concluded, incredibly, that an immediate discharge for drug use "was not reasonable because another stated ground for discharge was unauthorized reading on duty." (Petitioner's Appendix A, at 1-a, 2-a) Other irrational aspects of the arbitrator's opinion are noted at footnote 2 of the Petitioner's Appendix 3-a. The Court below did

not point out that although the employer argued to the arbitrator that the grievant should not be reinstated because of unfitness and policy considerations with respect to plant safety (Petitioner's Appendix A, 41-a), and although the arbitrator noted (albeit imperfectly) the employer's position with respect to reinstatement (Petitioner's Appendix A at 41-a), the arbitrator ignored the issue completely in his 33 page opinion. The arbitrator simply did not do his job and chose "to dispense his own brand of industrial justice." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

Thus, while the decision below was based upon the "public policy" exception, it could have been based upon the fundamental irrationality or arbitrariness and capriciousness of the award or the award's exceeding the powers of the arbitrator under *World Airways, Inc., supra.* The District of Columbia Circuit Court Of Appeals stated that the first inquiry a court may make in these cases is "Was the award arbitrary and capricious?" *Office and Professional Employees International Union, Local 2 v. Washington Metropolitan Area Transit Authority,* 724 F.2d at 140. Respondent Misco, Inc. submits that the arbitrator's award in this case was clearly arbitrary and capricious, and was so irrational that no court would have enforced it, that the result below is correct, and therefore, that it does not have the national significance that would merit the attention of the United States Supreme Court.

CONCLUSION

Respondent submits that this case does not merit the granting of a Writ of Certiorari because there is no conflict among the Circuits with respect to the application of the "public policy" exception when matters of public safety are involved. Further, there is no conflict among the Circuits even under the Petitioner's approach because OSHA makes it unlawful for an employer to provide an unsafe workplace. The application of the "public policy"

exception by the Fifth Circuit to the Misco, Inc. facts was proper and well reasoned. The arbitration award itself is so irrational, arbitrary and capricious, as to be unenforceable by any court, and does not merit the attention of this Court as a case of national significance.

Respectfully submitted,

A. RICHARD GEAR
HUDSON, POTTS & BERNSTEIN
Post Office Drawer 3008
Monroe, Louisiana 71210
(318) 388-4400
Attorneys for Respondent Misco, Inc.

APPENDIX

APPENDIX

Excerpt from Text of Fifth Circuit Brief of Respondent, Pages 7-13

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN REFUSING TO ENFORCE THE ARBITRATOR'S AWARD.

A. The District Court relied exclusively on the arbitrator's written findings in refusing to enforce his award.

The Defendant Unions assert at pages 8-11 of their brief that the District Court went beyond the scope of judicial review of labor arbitration decisions. However, the District Court relied solely upon the facts found by the arbitrator in the award. The recitation of facts in the decision of the District Court tracks the findings of fact in the award very carefully, which facts included the circumstances of the after-discovered evidence marijuana in the grievant's car. (See arbitration award reproduced in Defendant's brief at Appendix A, pp. 29, 40, 41, 42, 43).

The findings of fact of the arbitrator were particularly detailed at page 29 of Defendant's Appendix A, as set forth below:

> "The Grievant signed a consent for the police to search his car. Officer Toney searched the Grievant's car and found a plastic scales case with gleanings of alleged marijuana. Toney sealed these items in a bag and they were placed in the Metro Narcotics Evidence Room where it remained until 9/21/83. Toney did not bother telling anyone about the gleaning of alleged marijuana, but did they were con-

> tained in his report of the incident. These items were found when the Company Attorney and one of his associates went to police headquarters to go over the case in preparation for the instant Hearing. In the process of going through the Grievant's police file (with the proper approval) with the two Company Attornies, Officer Toney found his record of the gleanings found in the Grievant's car on January 21, 1983. The gleanings were submitted to the North Louisiana Criminalistics Laboratory and a report was received dated 9/21/83 (CE-5) indicating that the substance was in fact marijuana. The cigarette found in the white Cutlass was also submitted to the same laboratory and a report was received on 2/4/83 (CE-4) indicating that the cigarette was marijuana."

At no point in the decision does the arbitrator dispute the testimony of the police officer Royce Toney or the certified report of the North Louisiana Criminalistics Laboratory that marijuana was found in the car of the grievant on the night of his arrest. Indeed, he credited the police accounts as against the account of the grievant. (Defendant's Appendix A, 42-43).

The undersigned has been unable to locate any finding of the arbitrator, crucial or otherwise, that would preclude the District Court's reliance upon the above and other findings of fact with respect to the after-discovered evidence of marijuana possession by the grievant. The arbitrator clearly failed to even consider plaintiff-employer's substantial argument that the after-discovered misconduct rendered the grievant unfit for reinstatement (See Defendant's Appendix A, 33, 47, 48).

In these circumstances, the action of the District Court in relying upon the arbitrator's findings of fact was entirely appropriate.

The scope of judicial review was properly exercised in accord with precedent of this Court.

Thus, the District Court did not exceed the scope of permissible-judicial review, but relied solely upon the decision and factual presentation of the arbitrator, an approach mandated by this Court in *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983). In that case this Court made the determination that reinstatement of an over-the-road truck driver, who was caught drinking liquor on duty, violated public policy. This determination was made without the necessity of finding fraud, bias or prejudice on the part of the arbitrator, a contention advanced by the defendant Unions in the instant case. Thus, if an arbitral award violates public policy, that award will not be enforced by the courts without any analysis required of fraud, bias or prejudice on the part of the arbitrator. The cases cited by the defendant Unions in their brief are not cases where it was alleged that the enforcement of the awards would violate public policy and, therefore, are distinguishable from the *Amalgamated Meat Cutters* line of cases relied upon by plaintiff employer.

B. The District Court was correct in applying the public policy exception.

It is understood that arbitration and the validity of arbitral awards is favored by the courts as a matter of national labor policy. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America vs. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed 2d 1423 (1960). This Court has recognized that enforcement of an arbitration award may be denied if enforcement would violate public policy. *Amalgamated Meat Cutters, supra*; *Sea-Land Service, Inc., v. International Longshoremen's Association of New York*, 625 F.2d 38, 42 (5th Cir. 1980); *Johns-Manville Sales v. Interna-*

tional Association of Machinists, Local 1609, 621 F.2d 756, 757 (5th Cir. 1980); *General Warehouseman & Helpers v. Standard Brands, Inc.*, 579 F.2d 1282, 1292 n. 8 (5th Cir.) (en banc).

In *Amalgamated Meat Cutters, supra*, at 124, this Court restated the principle that "the public policy necessary to prevent enforcement of a collective bargaining agreement must be well defined and dominant, and is to be ascertained by a reference to the laws and legal precedents and not from general consideration of supposed public interests."

The policy consideration enunciated in *Amalgamated Meat Cutters, supra*, at 124, was that an over-the road truck driver who drinks alcohol on duty is a danger to himself and to the public, and an arbitral award which orders reinstatement is against public policy. The public policy of preventing people from drinking and driving on the public highways was found to be embodied in case law, regulations, statutory law, and common sense.

In the instant case, the grievant had been employed as a slitter/winder operator, a machine deemed extremely hazardous by the arbitrator because it features exposed sharp blades used to cut rolling coils of paper. A large number of industrial accidents involving this machine have occurred in the past at the employer's facility. The use of intoxicants, such as marijuana, alcohol or other controlled substances, unquestionably impairs the judgment and coordination of individuals, and thus increases the probability of a dangerous industrial accident involving this hazardous equipment. The company has had rules in effect for a number of years prohibiting the possession or use of intoxicants, narcotics or controlled substances in the plant or on the plant premises. Evidence of a drug problem had surfaced at the plant and the employer had taken steps to warn the employees of the existence of the rule prohibiting drug use and possession, and had taken steps to catch offenders.

These rules and concerns are in accord with national policy as exemplified by the Occupational Safety and Health Act 29 U.S.C., Sec. 651-678, particularly Section 654, which states as follows:

> "(a) Each employer—
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
>
> (2) shall comply with occupational safety and health standards promulgated under this chapter.
>
> "(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct."

In addition to the clearly stated national safety and health policies, the criminal laws of the State of Louisiana at La. Rev. Statutes 40:966(D) provide that the use or possession of marijuana is a criminal act, a clear embodiment of public policy in this State.

Another consideration of public policy involved is that reinstatement of this hazardous machine operator who violated the rules against the use or possession of marijuana on company premises will operate to encourage other employees to violate the employer's rules and further increase the drug and safety problems at the plant. This factor has been recognized by this Court in a case involving thievery in *NLRB v. Big Three Welding Equipment*, 359 F.2d 77, 82-84 (5th Cir. 1966), where it was stated that "reinstatement in such circumstances could well be an invitation to continue such misconduct

on the part of the reinstated employees, as well as others." And in *U.S. Postal Service v. American Postal Workers Union*, 736 F.2d 822, at 825 (1st Cir. 1984), the Court recognized that the impact on other employees of the dishonest employee's reinstatement may be to encourage dishonesty.

The Defendant Unions' position would require an *admission* by the grievant of drug use or possession before the *Amalgamated Meat Cutters* public policy exception could apply. However, as shown *supra* the arbitrator's findings of fact clearly accepted as true the neutral accounts of the police and the North Louisiana Criminalistics Laboratory that marijuana was discovered during a lawful search of the grievant's car on the company premises. Moreover, the arbitrator did *not* specifically credit the grievant as against the police accounts.

The District Court's decision was consonant with the findings of fact of the arbitrator in its determination that the award should not be enforced for public policy reasons.

It is submitted that the public considerations in the instant case warrant affirmance of the District Court's refusal to enforce the arbitration award on the authority of *Amalgamated Meat Cutters, supra.*

CONCLUSION

Based on the foregoing, and the entire record, the plaintiff employer submits that the scope of judicial review exercises by the District Court was proper and that the public policy exception to enforcement of an arbitration award clearly applied to this case. Further, in view of the finding by the District Court, it cannot be said that the employer's refusal to abide by the arbitration award was without justification, and no attorney's fees should be levied regardless of this Court's decision on the merits.

Respectfully submitted,

/s/ A. Richard Gear
A. RICHARD GEAR
HUDSON, POTTS & BERNSTEIN
P.O. Drawer 3008
Monroe, Louisiana 71210
Attorneys for Plaintiff-Appellee

CERTIFICATE

I hereby certify that an exact copy of the above and foregoing has this date been mailed to all counsel of record by placing same in the U.S. Mail, postage prepaid, this 19th day of February, 1985.

/s/ A. Richard Gear
A. RICHARD GEAR

Supreme Court U.S.
FILED
DEC 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO and OUACHITA LOCAL 654,

Petitioners,

v.

MISCO, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONERS

LYNN AGEE
MARK BROOKS
3340 Perimeter Hill Drive
Nashville, Tennessee 37211

MICHAEL H. GOTTESMAN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
DAVID SILBERMAN
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:
ROBERT H. URANN
3540 Severn Avenue
Metairie, Louisiana 70002

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases Page

Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975) 5

Amalgamated Transit Union v. Aztec Bus Lines, 654 F.2d 642 (9th Cir. 1981) 3-4

American Postal Workers Union v. United States Postal Service, 789 F.2d 1 (D.C. Cir. 1986) 2

Bevles Co., Inc. v. Teamsters Local 986, 791 F.2d 1391 (9th Cir. 1986), *pet. for cert. pending*, No. 86-431 3

E.I. Dupont de Nemours v. Grasselli Emp. Ass'n, 790 F.2d 611 (7th Cir. 1986), *cert. denied*, —— U.S. ——, 55 LW 3235 (1986) 6

Jacob E. Decker & Sons, 244 NLRB 875 (1979), *enf'd*, 636 F.2d 129 (5th Cir. 1981) 7

Muschany v. United States, 324 U.S. 49 (1945) 5

Office & Prof. Emp. v. Wash. Metro. Area Tr. Auth., 724 F.2d 133 (D.C. Cir. 1983) 2

Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960) 7

United States Postal Service v. Nat. Ass'n of Letter Carriers, 789 F.2d 18 (D.C. Cir. 1986) 2

W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983) 5, 7

World Airways, Inc. v. International Brotherhood of Teamsters, Airline Division, 578 F.2d 800 (9th Cir. 1978) 3, 4

Constitution and Statutes

Constitution of the United States, Supremacy Clause 2

National Labor Relations Act, 29 U.S.C. §§ 151ff..
Section 7, 29 U.S.C. § 157 6
Section 8(a)(3), 29 U.S.C. § 158(a)(3) 6-7

Occupational Safety and Health Act, 29 U.S.C. § 654 5

Miscellaneous

Elkouri & Elkouri, *How Arbitration Works* (4th Ed. 1985) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-651

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO and OUACHITA LOCAL 654,

Petitioners,

v.

MISCO, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONERS

---

1. Respondent attempts in two different ways to dispute our contention that the decision below conflicts with decisions of other courts of appeals as to the scope of the "public policy" exception to enforcement of arbitration awards. Respondent argues first that there is no conflict at all among the circuits over the scope of the "public policy" exception, and second, that if there is such a conflict, it is inapplicable to cases involving safety. Both efforts are unavailing.

a. Respondent challenges our statement that the District of Columbia and Ninth Circuits have held the public

policy exception applicable only to arbitration awards that conflict with positive law. Respondent does not dispute our reading of the D.C. Circuit's decision in *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986), which squarely held that an arbitration award can be set aside as violative of public policy only if the award conflicts with positive law. But, respondent suggests, the D.C. Circuit in another case, *United States Postal Service v. Nat. Ass'n of Letter Carriers*, 789 F.2d 18 (D.C. Cir. 1986), while "admittedly . . . not[ing] the narrow scope of the public policy exception," nonetheless broadened that exception by "*consider*[*ing*] the Postal Service's broader public policy argument that the Postal Service's operations 'are not to be subjected to a patchwork of conflicting state laws.'" (Br. Op. 3; emphasis in Br. Op.). Respondent has simply misunderstood the latter decision.

The *Letter Carriers* decision expressly adopted (789 F.2d at 19) the legal standard announced three days earlier in *American Postal Workers*. In *Letter Carriers*, the court merely applied that standard to determine whether an arbitration award requiring the Postal Service to comply with a Tennessee statute conflicted with the Supremacy Clause (the Postal Service contending that the Tennessee statute was preempted). The court, concluding that the award did not conflict with the Supremacy Clause, rejected the "public policy" argument in accordance with the *American Public Workers* standard. 789 F.2d at 20-21.[1]

Respondent's attempt to undermine our reading of the Ninth Circuit's decisions is equally wide of the mark.

---

[1] The only other District of Columbia Circuit decision cited by respondent, *Office & Prof. Emp. v. Wash. Metro. Area Tr. Auth.*, 724 F.2d 133 (D.C. Cir. 1983), preceded those discussed in text, and did not present any question respecting the scope of the public policy exception announced in *Grace*. The dictum quoted by respondent appeared in a general delineation of the principles applicable to the enforcement of arbitration awards.

Respondent does not challenge our showing that the Ninth Circuit held inconsistency with law to be the limit of the public policy exception in *Amalgamated Transit Union v. Aztec Bus Lines*, 654 F.2d 642, 644 (9th Cir. 1981) and *Bevles Co., Inc. v. Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986), *pet for cert. pending*, No. 86-431. But, respondent contends, the Ninth Circuit in a decision that preceded these had construed the public policy exception more broadly (Br. Op. 4-5, citing *World Airways, Inc. v. International Brotherhood of Teamsters, Airline Division*, 578 F.2d 800 (9th Cir. 1978)). *World Airways* is not inconsistent with the Ninth Circuit's more recent decisions; rather, unlike those decisions, *World Airways* involved an award that indeed *was* found to conflict with positive law. In that case an air carrier removed a pilot whose past performance, the carrier believed, demonstrated an incapacity to conform to safety regulations. Federal Aviation Act regulations require an air carrier to remove a pilot falling into this category. An arbitrator, disagreeing with the carrier's assessment of the pilot's capabilities, ordered the pilot reinstated. The Ninth Circuit set the award aside on the ground that "federal law clearly places the responsibility upon the airline [not the arbitrator] to determine whether or not a pilot possesses the judgment to serve as a Pilot-in-Command," *id.* at 803. Thus the award was set aside because, in overturning the airline's determination, the award violated federal law.

b. Respondent's second basis for attempting to deny the existence of a circuit conflict—that "safety" cases are different from other public policy cases—is doubly defective: the circuit conflict has been manifested in "safety" cases as well as others, and in any event there can be no basis for treating safety cases differently from other invocations of public policy without first resolving the dispute that is at the heart of the existing circuit conflict.

The Ninth Circuit's decision in *Aztec Bus Lines, supra, did* involve a claim that the award was inconsistent with

public safety—and in circumstances far more compelling than those present here—yet the Ninth Circuit enforced an arbitrator's award of reinstatement because no law forbade the employer's compliance. In *Aztec*, a bus driver "was involved in a number of accidents and mishaps during his first year of employment," 654 F.2d at 643, and was fired after the last of them. The arbitrator ordered the driver's reinstatement (converting the discharge to a two-week suspension). "[T]he arbitrator refused to consider all but one of those incidents as a basis for imposing sanctions" because the employer had not complied with the collective bargaining agreement's prescribed procedures for investigating and determining responsibility for accidents, *id.* at 643. With respect to the one "properly documented incident," the arbitrator concluded that the driver had "exhibited extremely poor judgment," but that that "incident, standing by itself, did not warrant dismissal," *id.* at 643-44. The Ninth Circuit rejected the employer's contention that the award should be denied enforcement because inconsistent with the public interest in highway safety, explaining;

> We agree that forcing a party to a collective bargaining agreement to break the law is against public policy, but no California statute has been called to our attention which would make it illegal to employ bus drivers who have previously shown bad judgment. [*Id.* at 644.]

Nor, under the principle adopted by the District of Columbia and Ninth Circuits, *could* there be any rational basis for applying a different legal standard to "safety" claims than to other invocations of public policy. Those courts, of course, would not enforce an arbitration award that ordered reinstatement of an individual whose continued employment was forbidden by laws or regulations enacted to protect the public safety. *See, e.g., World Airways, supra.*[2] But where (as here) government has

---

[2] Respondent makes a feeble attempt to bring this case within *that* doctrine, by asserting that the reinstatement of the grievant

not deemed it necessary to forbid employment out of concern for public safety, respondent proffers no rationale for its contention that those circuits would view a court as freer to invalidate arbitration awards which in the court's view are inconsistent with public safety than to invalidate awards which in the court's view jeopardize other public interests.

In an analogous context, this Court has declared improper the judicial erection of hierarchies of public interest that are not rooted in legislative determinations. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 263-64 (1975). And the Court seemingly applied that same concept to the enforcement of arbitration awards when it declared that a public policy, to justify non-enforcement, must "be 'ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983), quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945). It is this passage in *Grace* which the District of Columbia and Ninth Circuits have understood to limit the public policy exception to conflicts with positive law.

The broader judicial power advocated by respondent—a power to refuse enforcement of arbitration awards reinstating employees out of concern for public safety even though the employer may lawfully act as the arbitrator has commanded—is inconsistent with the central principle underpinning the decisions of District of Columbia and

---

here would have violated respondent's duty under the Occupational Safety and Health Act, 29 U.S.C. § 654, to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" (Br. Op. 8-9). But neither the court below nor the district court found that compliance with the award in the instant case would have violated OSHA. Nor is that surprising, for it would be far-fetched indeed to suggest that OSHA forbids the employment of a factory worker simply because on one occasion there were non-usable traces of marijuana in his automobile in the company's parking lot.

Ninth Circuits. As explained by Judge Easterbrook, in a case where public safety was the basis for the employer's resistance to the award:

> A power to set aside awards on grounds of public policy, as distinct from rules of law, is too sweeping. A court lacks this power for the same reason the arbitrator does—the function of arbitrator and court is to carry out a contract, and contracts bind unless made unlawful by rules of positive law. [*E. I. Dupont de Nemours v. Grasselli Emp. Ass'n*, 790 F.2d 611, 618 (7th Cir. 1986) (concurring opinion), *cert. denied*, —— U.S. ——, 55 LW 3235 (1986).]

Where, as here, an arbitrator concludes that an employer has contracted to retain an employee, public policy is no more implicated than it would be were the employer to decide on its own to retain that employee. Whether respondent's safety thesis is valid thus turns entirely on the resolution of the existing conflict over the scope of the public policy exception to the enforceability of arbitration awards.

2. Respondent contends that the refusal to enforce arbitration awards directing reinstatement of marijuana possessors comports with the national labor policy, as reflected in decisions under the National Labor Relations Act cited at Br. Op. 10. The cited decisions are inapposite, and, indeed, the *pertinent* decision under the NLRA points quite the other way.

In each of the cases cited by respondent, the employer was accused of discharging employees because of their union activities, thus violating Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3). In each, the Board found that union activities had played no part in the employer's decision, which instead had been motivated solely by the employee's drug or alcohol possession or consumption. Because § 8(a)(3) is implicated only when decisions are motivated by the exercise of rights under § 7 of the NLRA, 29 U.S.C. § 157, these fact-findings necessarily

established that § 8(a)(3) was not violated. That is all that the decisions cited by respondent held.

In the only truly analogous NLRA case we have found —*i.e.*, where an employee *was* found otherwise entitled to reinstatement under the NLRA, but the employer asserted that it would contravene public policy to reinstate the employee because he was a drug possessor—the NLRB ruled that reinstatement was not to be withheld on that ground. *Jacob E. Decker & Sons*, 244 NLRB 875, 878 (1979), *enf'd*, 636 F.2d 129 (5th Cir. 1981).

3. Respondent contends that the arbitrator's award was "fundamentally irrational and arbitrary," and that this constitutes an independent reason why it should not have been enforced (Br. Op. 10-11). Respondent concedes that this is not the ground upon which the lower courts vacated the award (*id.* at 11). Indeed, this claim was not even raised by respondent in the court of appeals, and thus cannot be invoked by respondent in this Court.

In any event, respondent's contention is frivolous, both as a matter of law and as a matter of fact. As a matter of law, an arbitration award which, as here, indisputably "draws its essence" from the collective bargaining agreement, may not be overturned because a court deems it "fundamentally irrational and arbitrary." As this Court has repeatedly held, where the parties have jointly selected the arbitrator and agreed that his decision will be the final and binding resolution of their dispute, the courts are not free to substitute their view of the merits of the contract issue for that of the arbitrator. *See, Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 596 (1960); *Grace, supra*, 461 U.S. at 764.

And as a matter of fact, the award here is not "fundamentally irrational and arbitrary." To the contrary, the arbitrator's award, which is reprinted at Pet. App. 25a-53a, is intelligent, logical, careful, and erudite, and vindicates his status as a well-known and widely experienced

arbitrator (Pet. 4 & n.3).[3] We refute in the margin the side-swipes at the award mentioned in passing by the majority below—factors which the court below did not hold (or suggest) could justify denying enforcement to the award, but that respondent cites for its contention in *this* Court that the award can be invalidated on an alternate ground.[4]

---

[3] In assessing whether there was "just cause" for the discharge, the arbitrator faithfully and conscientiously applied a seven-part test (App. 43a-44a) that is widely used by arbitrators. Elkouri & Elkouri, *How Arbitration Works* (4th Ed. 1985), p. 666 & n.86.

[4] The majority below stated that the arbitrator "criticize[d] the employer for not having the *investigation* of Cooper's incident conducted by 'some higher, detached company official,' notwithstanding that it was directed by the president of the company, assisted by the production supervisor" (App. 1a-2a, n.1, emphasis added). But the arbitrator fully understood that the president and production supervisor had *investigated* the incident (App. 39a-40a); the arbitrator's criticism was that the company had thereby departed from the customary practice that there be "some higher, detached Company official to assume and conscientiously perform the *judicial* role" following receipt of the investigator's findings (App. 47a; emphasis added).

The majority below suggested that the arbitrator equated drug possession with unauthorized reading on duty in terms of the propriety of discharge as a sanction (App. 2a, n.1). In fact, the arbitrator was addressing whether the Company rule listing drug possession among the "Causes for Discharge" connoted that discharge was the *automatic* sanction for that offense; finding that the same rule also listed unauthorized reading on duty as a dischargeable offense, and observing that "[i]t is difficult for this Arbitrator to see where both reading on duty and being involved with marijuana in the manner the Grievant is charged, have equal weight for immediate discharge," the arbitrator concluded that the rule did not mean that discharge was the *automatic* sanction for the offenses listed therein (App. 45a).

The majority below pointed to a supposed inconsistency between the arbitrator's findings (1) that there was a lighted marijuana cigarette in the car and (2) that the police observing the car *saw* no evidence of a cigarette burning (App. 3a n.2). But the arbitrator's point was that, in the abence of visual observation of the burning pattern that is normally observable when a marijuana cigarette is puffed in the dark, or of visual observation of a cigarette being passed between occupants, there was nothing to show that the grievant (who was sitting in the back seat of the car) had smoked the lighted cigarette found in the front seat ashtray (App. 49a-50a).

Finally, the majority below mocked the arbitrator's informing the parties at the outset of the arbitration hearing that he is a Creek American Indian (App. 1a, n.1). While we do not know the arbitrator's reason, it is a fair surmise that as the grievant was black, the arbitrator wished to disclose to the parties that he, too, was a member of a racial minority.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

LYNN AGEE
MARK BROOKS
3340 Perimeter Hill Drive
Nashville, Tennessee 37211

MICHAEL H. GOTTESMAN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
DAVID SILBERMAN
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:
ROBERT H. URANN
3540 Severn Avenue
Metairie, Louisiana 70002

Supreme Court, U.S.
FILED
MAR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-651

In The Supreme Court of the United States

October Term, 1986

United Paperworkers International Union, AFL-CIO and Ouachita Local 654,
Petitioners,

v.

Misco, Inc.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

JOINT APPENDIX

Richard Gear
Cook, Yancey, King & Galloway
American Tower, Suite 400
401 Market Street
Shreveport, Louisiana 71101
(318) 221-6277
Counsel for Respondent

Laurence Gold
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Counsel for Petitioners

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Complaint	3
Answer	8
Exhibits to Answer	13
Answer to Counterclaim	24
Defendants' Motion to Dismiss and for Summary Judgment	26
Exhibits to Defendants' Motion	28
Plaintiff's Cross Motion for Summary Judgment	31
Exhibits to Plaintiff's Cross Motion	33
Notice of Appeal	43

RELEVANT DOCKET ENTRIES

Date	Nr.	Proceeding
11/21/83	1	COMPLAINT (ljs) #
11/22/83	2-3	SUMMONS, issued & returned to atty for service (ljs)
12-21-83	4	ANSWER (Ds) to P's Complaint. (om) A RT
1-9-84	5	ACK of Receipt of Service by Mail: United Paperworkers International Union, Ouachita Local 654 served 12-9-83. (om)
2-27-84	6	ORDER - reassigning case to Judge Stagg from Judge Scott. (RHS/bc) NOE 2-28-84.
3-12-84	7-9	MOTION (Ds) to Dismiss and for SJ. Notice mailed 3-14-83 for 5-7-84 Calendar. (om) NOE
3-14-84	11	ANSWER (P) to CC. (om)
3-15-84	11	LETTER from Robert H. Urann to Clerk with attached copy of recent Fifth Circuit decision, requesting that it be brought to the Court's attention in connection with the Union's Motion for SJ. (om)
3-23-84	12-13	MOTION (P) for Extension of Time to File Opposition to D's Motions for Dismissal and SJ and to File P's Cross-Motions for SJ, referred. (om)
3-28-84	13*	ORDER allowing Pltf. until 4-18-84 to file opposition to D's Motions to Dismiss & SJ. (TS/sjd) NOE.
4-18-84	14-16	CROSS-MOTION (P) for SJ. Notice mailed 4-19-84 for 6-4-84 Calendar. (om) NOE
4-23-84	17	ME, Both motions for SJ are set for determination on 6-4-84. (TS) (om) NOE 4-23-84.
4-30-84	18-	EX-PARTE Motion (Ds) for Extension of Time to Plead, referred. (om)

Date	Nr.	Proceeding
5-2-84	19	ORDER granting Ds 10 days or until 5-8-84 within which to file Opposition to P's Cross Motion for SJ. (TS) (om) NOE 5-2-84
5-4-84	20	MEMORANDUM (Ds) in Opposition to P's Cross-Motion for SJ. (om)
8-15-84	21	LETTER (Robert H. Urann) to Judge Stagg, advising that the union again asserts that the arbitrator's award should be enforced and that the Postal Worker's case is not controlling under the facts. (bc)
10-3-84	22	MEMORANDUM Ruling; P's Motion for SJ; GRANTED. D's Motion for SJ; DENIED. Award of the arbitrator set aside. (TS/sjd) NOE 10-4-84.
10-3-84	23	JUDGMENT in accordance with Memorandum Ruling. Motion for SJ on behalf of Deft.; DENIED. Motion for SJ on behalf of Pltf.; GRANTED & the award of the arbitrator is SET ASIDE. (TS/sjd) DKT'D. 10-4-84.
		CLOSED
10-26-84	24	NOTICE OF APPEAL (D) of 10/24/84 jmt NOE: Ct.A, Urann w/app info ltr., Brooks, Gear Judge Stagg, B. Terry (pp)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. CV 83-2904 -

MISCO, INC.

versus

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, and ITS QUACHITA LOCAL 645

[Filed Nov. 21, 1983]

PETITION

JURISDICTION

1.

The jurisdiction of this Court is invoked under Section 301(a) of the Labor-Management Relations Act, U. S. C. § 185(a), and the Arbitration Act, 9 U.S.C. § 4.

2.

This is a suit for violation of contract as set forth in § 301(a) and is within the jurisdiction of this Court regardless of the amount in controversy or the citizenship of the parties.

CAUSE OF ACTION

3.

This action seeks an order vacating and setting aside the October 31, 1983 arbitration award of arbitrator

Milden J. Fox, Jr. A copy of the award is attached hereto as Exhibit #1.

4.

The arbitration award referred to in paragraph 3 above should be set aside because the arbitrator exceeded his powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made, as required by 9 U.S.C. § 10 of the Arbitration Act for the following reasons:

REASONS ARBITRATION AWARD SHOULD NOT BE ENFORCED

(a) The arbitrator ignored the illegal possession of marijuana on the premises of Misco, Inc. by the discharged employee, a fact which was discovered subsequent to the discharge, and issued an award which compelled reinstatement of the employee as an operator of hazardous machinery, contrary to the public welfare and public policy and over the objections of the employer.

(b) The arbitrator failed to set forth findings of fact and reasons to support his decision to reinstate the discharged employee with back pay despite the employer's objections that reinstatement and back pay were inappropriate in view of the criminal conduct discovered subsequent to the employee's discharge.

(c) the arbitrator's award does not draw its essence from the contract and is without rational support in that he found it was not reasonable to discharge an employee for violation of the company rules prohibiting possession or use of narcotics on company premises, where the employer clearly has discretion under the collective bargaining agreement to promulgate the work rules.

(d) The arbitrator failed to consider that the marijuana found in the discharged employee's car is evidence that corroborated the fact that the employee possessed or was using marijuana on January 21, 1983, the night

he was arrested by the police on the employer's parking lot.

(e) The arbitrator discredited the denials of the discharged employee that he was in the back seat of a vehicle on the company's parking lot in which a lit marijuana cigarette was found, but the arbitrator did not discredit the employee's denial that he had smoked or possessed the marijuana cigarette found in the ashtray of the vehicle.

(f) Although the arbitrator credited the police who testified the employee was in the car where the lit marijuana cigarette was found and from which vehicle emanated the aroma of marijuana, and discredited the employee's denials that he had been in the vehicle at all, he found that the evidence was not "substantial" to establish just cause for the discharge.

(g) The arbitrator relied upon evidence not in the record with respect to the testimony of police in other arbitration cases concerning the burning patterns of marijuana cigarettes and concluded in view of the alleged evidence from outside the record that it would have been difficult for the police not to have seen someone light a marijuana cigarette in the vehicle.

(h) Such reliance on the non-record evidence with respect to the burning pattern of a lit marijuana cigarette is particularly prejudicial and irrational in view of the fact that the officers testified they smelled marijuana smoke from the vehicle and found a lit marijuana cigarette in the vehicle.

(i) The arbitrator relied upon a decision of the Louisiana Office of Employment Security granting unemployment compensation in circumstances in which the decision showed no direct testimony from the police was entered into the record and in which the issues were not the same.

(j) The arbitrator speculatively and prejudicially relies upon the failure of night foreman Jerry Ewing to testify as demonstrating an inadequate investigation when the evidence clearly indicated that Ewing advised his superiors that he was elsewhere in the plant at the time of the arrest and did not know about it.

(k) While the Union did not challenge the uncontroverted testimony that the rule prohibiting possession or use of narcotics and alcoholic beverages had always been enforced, the arbitrator found that because the company did not pursue a violation of company policy involving of a whiskey bottle found in the vehicle where the marijuana was found, the rule was discriminatorily enforced, an irrational conclusion in the circumstances of this case which ignores testimony of production manager Covington with respect to handling the investigation of the whiskey bottle and which further prejudicially ignores and is in contradiction of contract Article IV which provides in part that the company's failure to exercise any function or right in any particular way shall not be deemed a waiver of its rights to exercise such function or right.

(l) The arbitrator irrationally determined that the penalty of dismissal in this case was not reasonably related to the nature of the offense and the employee's past record at the time when the employee involved was on probation and the offense involved a violation of the criminal statutes of the State of Louisiana and presented a safety hazard.

(m) The entire arbitration decision and award exceeded the authority of the arbitrator, is irrational, is not supported by substantial evidence, and is against the public welfare and public policy.

5.

The arbitration award should be vacated and set aside for the reasons set forth above and for those reasons found in the entire record of these proceeding.

RELIEF

6.

It is respectfully requested that the arbitration award be vacated and set aside.

7.

It is further requested that all other relief which may be just and proper be granted the petitioner, including the award of costs and attorney's fees.

Respectfully submitted,

HUDSON, POTTS & BERNSTEIN
Post Office Drawer 3008
Monroe, Louisiana 71210

By: /s/ A. Richard Gear 11/18/83
A. RICHARD GEAR
Counsel for Misco, Inc.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. CV 83-2904

MISCO, INC.,
Plaintiff

vs.

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, and ITS OUACHITA LOCAL 654,
Defendants

[Filed Nov. 21, 1983]

ANSWER

Defendants United Paperworkers International Union and its Ouachita Local 654 (hereinafter collectively referred to as the "Union") hereby answer in this cause as follows:

1.

The Union admits that jurisdiction in this cause is proper under § 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), as set out in Paragraph 1 of the Complaint, but denies that jurisdiction may properly be invoked under the provisions of the Arbitration Act, 9 U.S.C. § 4.

2.

The Union admits subject matter jurisdiction herein under § 301(a) of the Labor-Management Relations Act, but denies all other allegations of Paragraph 2 of the Complaint.

3.

The Union admits that the Complaint seeks an order vacating the October 31, 1983 Arbitration Award of Arbitrator Milden J. Fox, Jr., as set out in Paragraph 3 of the Complaint. The Union further admits that a copy of said Award is attached to the Complaint, but denies that said copy is marked as "Exhibit #1."

4, 5, 6, 7.

The Union denies the allegations of Paragraphs 4, 5, 6, and 7 of the Complaint, and specifically denies that Plaintiff is entitled to any relief in this cause.

AFFIRMATIVE DEFENSES

8.

Plaintiff's Complaint fails to state a claim against the Union upon which relief can be granted.

9.

The Union submits that Arbitrator Fox has taken his decision from the essence of the Collective Bargaining Agreement between the parties, and that Arbitrator Fox in no way exceeded the authority granted to him under said Collective Bargaining Agreement.

10.

The Union denies each and every material allegation in the Complaint except such as are admitted in the Answer.

11.

Plaintiff's action is frivolous, vexatious, and in bad faith, and the Union is entitled to recover its attorneys fees and costs in this matter against Plaintiff.

COUNTERCLAIM

12.

The jurisdiction of this Court is invoked pursuant to the provisions of § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185.

13.

The Union is a labor organization representing employees in industries affecting commerce within the meaning of 29 U.S.C. § 152, and is engaged in the representation of employees in Monroe, Louisiana.

14.

Plaintiff is an employee in an industry affecting commerce within the meaning of 29 U.S.C. § 152. Plaintiff operates a paper converting facility at Monroe, Louisiana, and is authorized to and does engage in business within the jurisdiction of this Court.

15.

At all times material herein, Plaintiff and Defendant Union have been parties to a Collective Bargaining Agreement (hereinafter the "Agreement") which, by its terms, is in effect from March 30, 1981 through March 30, 1984. A copy of the Agreement is attached hereto as "Exhibit A."

16.

The Agreement referred to in Paragraph 15 contains, in Articles V and VI, a grievance and arbitration procedure for the resolution of all disputes arising out of the interpretation or application of the terms of the Agreement. The Agreement provides that if the parties are unable to resolve any disputes through the grievance procedure, the matter in dispute may be referred to final and binding arbitration.

17.

On or about February 7, 1983, a dispute arose between the parties concerning Plaintiff's discharge of employee Isiah Cooper (hereinafter the "Grievant"). On that date, Defendant Union timely submitted a grievance protesting Grievant's discharge and requesting that he be reinstated and made whole for all losses. This grievance was duly processed through all the steps of the grievance procedure, but the parties were unable to resolve said grievance. The grievance is attached hereto as "Exhibit B."

18.

Defendant Union thereafter submitted this grievance to binding arbitration, and the parties selected Arbitrator Milden J. Fox, Jr. to serve as Arbitrator in this matter. A hearing before Arbitrator Fox was held on September 26, 1983. On October 31, 1983, Arbitrator Fox issued an Award upholding the grievance, thereby ordering Plaintiff to reinstate the Grievant and to make him whole for all loss of earnings, seniority, and other benefits. A copy of the Award is attached to the Complaint.

19.

The Award of Arbitrator Fox draws its essence from the Collective Bargaining Agreement between the parties, and Arbitrator Fox in no way exceeded the authority granted to him under said Agreement. No grounds exist for setting aside the Award. Plaintiff nevertheless has refused to abide by said Award.

20.

Plaintiff's refusal to abide by the Award of Arbitrator Fox is unreasonable, in bad faith, and without justification, and the Union is entitled to recover its attorneys fees and costs in this matter against Plaintiff.

WHEREFORE, Defendant Union prays that this Court enter a judgment enforcing the Arbitration Award in its entirety against Plaintiff, and rendering Defendant Union its attorneys fees, costs, and all other relief to which Defendant Union may be held entitled.

Respectfully submitted,

/s/ Mark M. Brooks
MARK M. BROOKS, ESQ.
United Paperworkers Intl. Union
702 Church St., P.O. Box 1475
Nashville, TN 37202
(615) 254-6666

/s/ Louis L. Robein, Jr.
LOUIS L. ROBEIN, JR., ESQ.
BARKER, BOUDREAUX, LAMEY, GARDNER & FOLEY
1400 Richards Bldg.
837 Gravier St.
New Orleans, LA 70112
(504) 586-9395

(Certificate of Service Omitted in Printing)

EXCERPTS FROM THE COLLECTIVE BARGAINING AGREEMENT ATTACHED TO THE ANSWER AS EXHIBIT A

ARTICLE IV.

MANAGEMENT RIGHTS RESERVED

1. Subject to the expressed provisions of this collective bargaining agreement, the Company reserves and retains, solely and exclusively, all its inherent rights to manage the business as such rights existed prior to the execution of this Agreement. *The Company shall have the full and exclusive* authority to determine and direct the policies, procedures and methods of operating its business. Without limiting the generality of the foregoing, the management rights not abridged by this Agreement include, but are not confined to, the right to determine and from time to time, to redetermine the number, types and locations of its operations, and the methods, equipment, and processes to be employed; to discontinue or automate methods, equipment, processes or operations, the right to determine the qualifications for new employees and to select its employees; to determine standards of production and the size and composition of its work force; to determine production and shipping schedules and methods of shipping and production; to determine the number and type of equipment, machinery, materials and supplies to be used or operated and the products to be manufactured, processed or sold or the services to be rendered or supplied; to hire, promote, transfer and assign employees to work; to reprimand, discharge or otherwise discipline employees; to determine job content and the amount and type of work needed; to determine and make the assignments of work; to schedule the hours and days and breaks and number of breaks and to determine the number of hours and days to be worked in each job in each shift; to discontinue or to transfer, assign or subcontract all or any part of its

business operations to be performed by any outside person, firm or corporation whatsoever, selected by the Company in its sole discretion subject to the provision of Paragraph 3 of this Article, to expand, reduce, alter, combine, transfer, assign or cease any job, job classification, department or operation; to determine the amount of supervision necessary; to control and regulate or discontinue the use of supplies, equipment, machinery and processes and any other property owned, used, leased, or possessed by the Company; to unilaterally establish, modify, and enforce the plant rules or regulations and/or disciplinary procedures, policies and practices; to introduce new, different, or improved methods, means and processes of transportation, production, maintenance, service and operation; and, otherwise, generally to manage the plant and direct the work force; the Company's failure to exercise any function or right in any particular way shall not be deemed a waiver of its rights to exercise such function or right, nor to preclude the Company from exercising the same, in some other way not in conflict with the express provisions of this Agreement.

2. The above enumerated rights of management are not all inclusive, but indicate the types of matters which belong to and are retained by the Company.

3. Except as specifically abridged, delegated, granted or modified by this Agreement, or by any supplementary agreements that may be made hereinafter, all of the rights, powers and authority of the employer existing prior to the signing of this Agreement are retained by the Company and remain exclusive and without limitation within the rights of management. It is understood however, that work customarily assigned to members of the bargaining unit shall only be contracted out in cases of emergencies or overflow conditions and that it is not intended that subcontracting of work shall result in the lay-off of employees within the bargaining unit.

4. Union stewards and local union officers employed by the Company are subject to the same discipline as any other employee covered by this agreement for violation of the Company's rules and regulations.

5. When a written reprimand or statement against an employee is to be entered in his disciplinary record, the Company will furnish him with a copy of the same and require him to sign that he has received it. Failure to acknowledge receipt of such statement shall constitute just cause for discharge. In arbitration cases reprimands shall not be considered cumulative if more than one (1) year apart, but all reprimands shall remain permanently in the employees file.

ARTICLE V

GRIEVANCE PROCEDURE

1. Any dispute or grievance arising in the plant or arising out of the interpretation or application of the terms of this Agreement shall be settled in accordance with the procedures hereinafter set forth, provided, however, that the filing, discussion and settlement of grievances shall in no way interrupt production or hinder the efficient operation of Company's plant.

a. When filed by an employee:

Step 1. Such employee and/or his steward shall, within three (3) work days, exclusive of holidays or other non-work days, from the act or omission giving rise to the grievance, present such grievance to his immediate supervisor and earnestly attempt settlement of the grievance.

Step 2. Failing a satisfactory settlement within three (3) work days of the time when such grievance is presented to his immediate supervisor, the aggrieved employee may, either individually or through his steward, file said grievance with the

Production Manager within five (5) work days, exclusive of holidays and other non-work days, from the reply or action of or by his immediate supervisor, or from the end of the time allowed for his reply or action. Such grievance shall be in writing and shall state the specific provisions of this Agreement (giving the page and paragraph thereof) which he believes to have been violated in his case, and shall specify the act or omission giving rise to said grievance. Such grievance shall be taken up by the Production Manager at a time designated by him for the purpose of hearing and determining grievances. An aggrieved employee may discuss his grievances personally with the Production Manager or through his steward, as the employee may elect. However, in the event the aggrieved employee shall elect to present such grievance through his steward, such steward shall, prior to discussing such grievance with the Production Manager, present specific authorization in writing from the aggrieved employee authorizing him to present for settlement the actual grievance involved.

Step 3. Failing satisfactory adjustment of the grievance by the Production Manager within (5) work days after the grievance has been presented to him, exclusive of holidays or other non-work days, the employee may, either personally or through his duly authorized steward, appeal said grievance to the General Manager within five (5) work days, exclusive of holidays or other non-work days, of the reply or action by or of the Production Manager, or the end of the time for his reply or action. Such appeal shall be perfected by notifying the Company's General Manager, or his designated representative in writing of the substance of the grievance originally filed with the Production Manager, together with the specific provisions of this Agreement, (giv-

ing the page and paragraph thereof) which he believes to have been violated in his case, and of the specific details of the act or omission giving rise to said grievance. Such employee may also request that he personally, or through said employee's duly authorized steward, meet with the Company's General Manager, or his designated representative, and the Production Manager, for the purpose of presenting the grievance involved.

Step 4. In the event that the grievance shall not have been satisfactorily settled by the Company's General Manager, or his designated representative, within ten (10) days after recourse has been had to all the above steps, the employee may, within thirty (30) days of the action of the Company General Manager, or at the end of the time allowed for his reply, action or decision, make a written request for arbitration as set forth herein in Article VI.

b. In the event the Union in its capacity as the Collective Bargaining Agent or the Company is aggrieved concerning the administration or application of the Agreement, that party shall file written complaint with the other party within ten (10) days, exclusive of holidays or other non-work days, from the date on which the act or omission giving rise to such grievance occurred, setting out therein the provisions of this Agreement (giving the page and paragraph thereof) which is believed to have been violated, and specifically setting forth the errors it believes to have been committed. Such notice to the other party shall be perfected by notifying the designated representative, by Certified Mail, setting forth the information and details specified hereinabove. Failing satisfactory settlement by the other party within twenty-four (24) hours of the time when said written complaint has been received by the other party the aggrieved party may, within thirty (30) days from the date of decision, or of the end of the time allowed for

same, make a written request for arbitration set forth herein in Article VI.

2. The procedure herein set out for adjusting grievances shall constitute the only method available to aggrieved employees and/or the Union. Failure to comply with said procedure with respect to the time and manner of filing or grievances and appeals shall constitute a waiver of all complaints or grievances on the part of any employee who believes himself to be aggrieved, and/or on the part of the Union, and such grievance shall be deemed forever concluded and closed. Failure of the Supervisor, Production Manager or the General Manager to render a decision within the time specified in this Article shall be considered as a decision adverse to the aggrieved. If more than one grievance is filed with respect to the same act or omission giving rise thereto, the grievances shall be consolidated for hearing and decision in every step of the procedure hereby provided for their settlement.

3. Nothing in this Article nor under the terms of this Agreement shall ever be construed or applied so as to prevent any employee or group of employees from presenting their grievances to the Company and having the Company decide such grievances in accordance with the provisions of Section 9 (a) of the National Labor Relations Act, as amended.

ARTICLE VI

ARBITRATION PROCEDURE

1. Any grievance which remains unsettled after having been fully processed through the grievance procedure described in Article V may be submitted to arbitration upon the written request of either the Company or the Union, provided such request is made within thirty (30) days after final decision of the Company.

2. The impartial arbitrator shall be selected as follows: If the parties are unable to agree upon an impartial arbi-

trator within fifteen (15) days after notice of the arbitration is given to the other party, the Federal Mediation and Conciliation Service shall be requested to provide a list of five (5) arbitrators. Either party may refuse any list and request another. First the party desiring arbitration, then the other party, shall alternatively strike names from the mutually accepted list until only one (1) remains, and this person shall act as the arbitrator.

3. It is understood and agreed between the parties that the powers of the arbitrator are limited as follows:

a. He shall have no power to add to, subtract from or modify any of the terms of this Agreement or any supplementary agreement nor to rule on any matter except while this Agreement is in full force and effect between the parties.

b. He shall have no power to substitute his discretion for the employer's discretion in cases where the employer is given discretion by this Agreement.

c. He shall deal only with the grievance or grievances set forth in the submission agreement submitted to the arbitrator by the parties.

d. He shall not consider any heresay evidence.

e. Priority shall be given to deciding discharge cases and the arbitrator shall make his best effort to decide these cases within fourteen (14) days of the hearing.

f. The Company in no event shall be required to pay back wages for more than three (3) working days prior to the date a written grievance is filed. In the case of a pay shortage of which the employee could not have been aware before receiving his pay, any adjustment shall be retroactive to the beginning of the pay period covered by such pay, if the employee files his grievance

within three (3) working days after receipt of such pay.

g. All claims for back wages shall be limited to the amount of wages that the employee otherwise would have earned less any unemployment compensation or compensation for personal services or other awards or benefits that he may have received or could with diligent effort have received from any source during the period in question.

h. The decision of the arbitrator in any case shall not require a retroactive wage adjustment in any other case. Either party may, prior to the submission of a dispute to arbitration, state and the opposite party is bound to agree that the award shall not be a binding precedent in like or analogous situations.

4. The expenses of the arbitrator shall be shared equally between the Company and the Union, and each shall pay one-half (½) of the costs, fees and expenses incidental to any such arbitration exclusive of the fees and expenses of the attorneys or witnesses or other similar items of expenses incurred by each respective party. The arbitration proceedings may be recorded and transcribed by a court reporter or other qualified person upon the request of either party, at the expense of requesting party.

5. The decision of the arbitrator shall be final and binding to both parties of this Agreement.

* * * *

ARTICLE XI

MAINTENANCE OF DISCIPLINE

1. The Union agrees to cooperate with the Company in maintaining proper discipline and compliance with the plant rules and regulations. The Company shall retain the right to establish, maintain, enforce, rescind, amend

or change rules and regulations regulating the discipline or discharge of employees and the procedures for issuance of reprimands and other forms of discipline. Plant rules will be posted and a copy sent to the local Union before posting. The Union may challenge any plant rule within fifteen (15) days after such posting, only on the basis of fairness and necessity of such plant rule, however, plant rules will be effective immediately upon posting and remain in effect until ruled on by grievance and arbitration procedures as to fairness and necessity.

2. The Union agrees to cooperate with the Company in maintaining and improving the quality of work, operating efficiency, safety and production in the Company's operations. Recognizing that the welfare of the employees and their opportunities to maintain and improve their livelihood depend upon the efficiency in the Company's operations, and consistent with the principle of a fair day's work for a fair day's pay, the Union hereby pledges for itself and all of its members that they will perform their work effectively and efficiently to the best of their ability, and that they will wear all items of safety clothing and equipment required by the Company. In order for the Company to maintain the highest possible volume of production and quality of service, the Union will do all in its power to combat practices which impede or interfere with these objectives.

* * * *

GRIEVANCE ATTACHED TO THE ANSWER AS EXHIBIT B

GRIEVANCE REPORT

Grievance No. Plant No. MISCO Date 2-7-83

Name ISIAH COOPER Clock No. 1046

Job OPERATOR Department WINDER

Contract Reference

Article Work Rules Section

Nature of Grievance:

Unjustified Termination.

Settlement Desired:

Re-instate and make whole for all losses.

/s/ Isiah Cooper
Employee Signature

* * * *

Grievance Procedure—Second Step

Date Submitted Union Representative

Answer:

_____

Signature of Company Official

_____

Title

_____

Date

GRIEVANCE PROCEDURE—THIRD STEP

Date Submitted 2-7-1983 Union Representative Illegible

ANSWER: Meeting was held on Mon. 2/14/83 at 9:30 am to establish proof as to the reason why Isiah Cooper was terminated. Present were Otha Pittman (sic), Isiah Cooper, Horace Curry, Fred Billhorn, Biff Meredith, Charles Covington and two police officers who arrested Cooper on company property on Fri. Jan. 21. Isiah Cooper violated company rules in being in a car with a lit marijuana cigarette. This was a direct violation of company rules as outlined in present work contract of having an illegal substance on company property is subject to immediate termination. Management was asked to provide sufficient evidence at this hearing and are satisfied that they did. The two police officers testified that Cooper got out of the car where they found the lit marijuana cigarette.

/s/ Charles Covington
Signature of Company Official

Production Manager
Title

2/14/83
Date

* * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. CV 83-2904

MISCO, INC.,
Plaintiff

versus

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, and ITS OUACHITA LOCAL 654,
Defendants

[Filed Mar. 14, 1984]

ANSWER TO COUNTERCLAIM

Comes now MISCO, INC., Plaintiff in the above action and for answer to counter claim of Defendant Union for attorney's fees and costs, states in response thereto as follows:

1.

Plaintiff admits paragraph 12 and further states that the actions are invoked under the Arbitration Act, 9 U.S.C. Section 4.

2.

Plaintiff admits the allegations of paragraph 13.

3.

Plaintiff admits the allegations of paragraph 14.

4.

Plaintiff admits the allegations of paragraph 15.

5.

Plaintiff admits the allegations of paragraph 16.

6.

Plaintiff admits the allegations of paragraph 17.

7.

Plaintiff admits the allegations of paragraph 18.

8.

Plaintiffs denies the allegations of paragraph 19, except that Plaintiff has refused to abide by said award pending appeal to this Court based upon the grounds set forth in its petition.

9.

Plaintif denies the allegations of paragraph 20.

To the extent required to do so, Plaintiff denies the prayer for relief and asserts that the Plaintiff's refusal to abide by the award was not without justification and that Defendant Union should not be entitled to attorney's fees, costs or other relief.

Respectfully submitted,

HUDSON, POTTS & BERNSTEIN
Post Office Drawer 3008
Monroe, Louisiana 71210

By: /s/ A. Richard Gear
A. RICHARD GEAR
Attorneys for Misco, Inc.

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. CV 83-2904

MISCO, INC.,

Plaintiff,

vs.

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, and ITS OUACHITA LOCAL 654,

Defendants.

[Filed Mar. 12, 1984]

MOTION TO DISMISS AND FOR SUMMARY JUDGMENT OF DEFENDANTS UNITED PAPERWORKERS INTERNATIONAL UNION AND ITS OUACHITA LOCAL NO. 654

Pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure, Defendants United Paperworkers International Union (UPIU) and UPIU Local No. 654 (hereinafter collectively referred to as the "Union") hereby move to dismiss or in the alternative for summary judgment in this cause. The Union also moves for summary judgment in its favor on its Counterclaim for enforcement of the Arbitration Award.

In support of this Motion, the Union shows that there is no genuine issue as to any material fact in this matter and that the Union is entitled to judgment as a matter of law. This Motion is based on the pleadings in this cause and the enclosed Memorandum in Support of De-

fendant Unions' Motion to Dismiss and for Summary Judgment.

WHEREFORE, Defendant Unions' Motion to Dismiss and for Summary Judgment should be granted, and an Order entered by this Court dismissing Plaintiff's Complaint for vacation of the Arbitration Award, granting Defendant Union's Counterclaim for enforcement of the Award, and granting Defendant Union its costs, attorneys fees, and all other relief to which this Court finds the Union entitled.

Dated this 7th day of March, 1984.

/s/ Robert H. Urann
ROBERT H. URANN
BARKER, BOUDREAUX, LAMY,
GARDNER & FOLEY
837 Gravier Street, Suite 1400
New Orleans, LA 70112
(504) 586-9395

(Certificate of Service Omitted in Printing)

EXHIBITS TO DEFENDANTS' MOTION

EXHIBIT No. 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. CV 83-2904

MISCO, INC.,
Plaintiff,

versus

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, and ITS OUACHITA LOCAL 654,
Defendants.

AFFIDAVIT

STATE OF TEXAS)
TARRANT COUNTY)

BEFORE ME, the undersigned Notary Public, personally came and appeared James H. Dunn, 1212 Circle Lane, Bedford, Texas 76021, who after being duly sworn, deposed and stated as follows:

1. I am currently employed as an International Representative of the United Paperworkers International Union (Union), Region VI.

2. As the International Representative for Region VI, I represented the Union in the final and binding Arbitration between Misco, Inc. of Monroe, Louisiana and the United Paperworkers International Union Local No. 654 of West Monroe, Louisiana on September 26, 1983, which

arbitration concerned the grievance of the discharge of Isiah Cooper.

3. On or about October 31, 1983, Arbitrator M.J. Fox, Jr., P.E., Ph.D. rendered his decision in the arbitration and sustained the grievance. The award ordered Misco to restore Isiah Cooper to his job and make him whole for any lost earnings, seniority or other fringe benefits.

4. Immediately after I received a copy of Arbitrator Fox's Opinion and Award, I received a phone call from Misco President, Fred A. Billhorn, wherein Mr. Billhorn informed me that the Union was responsible for turning loose a dope dealer and that we were a detriment to the City of Monroe. He also said that he was going to do everything he could, including talking to everyone he knew in Monroe, to destroy the Union. Finally, he told me that he had no intention of complying with Arbitrator Fox's Award and would spend every penny he had to keep the matter tied up in court and Isiah Cooper out of his plant.

The above and foregoing statement is true and correct to the best of my knowledge, information and belief.

/s/ James H. Dunn
JAMES H. DUNN

Sworn to and subscribed before me Notary Public this 5 day of March, 1984.

/s/ Rita Laylors
Notary Public

EXHIBIT No. 3

Law Offices
HUDSON, POTTS & BERNSTEIN
Tenth Floor
Ouachita National Bank Building
P.O. Drawer 3006 Tel. (318) 386-4400
Monroe, Louisiana
71210

November 14, 1983

Mr. James H. Dunn
UNITED PAPERWORKERS INTERNATIONAL UNION
3131 N. Stemmons Fwy.
Suite 59—Lewis Building
Dallas, Texas 75247

Re: Isiah Cooper Arbitration

Dear Jim:

This is to confirm that Misco, Inc. will move to vacate the Arbitration Award in the above matter. Misco, Inc. waives Isiah Cooper's presenting himself for work in person. You may consider that he has presented himself for work and has been refused his job and back pay in total compliance with the obligations imposed upon him by the Arbitration Decision.

Very truly yours,

HUDSON, POTTS & BERNSTEIN

/s/ A. Richard Gear
A. RICHARD GEAR

ARG/dh

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. CV 83-2904

MISCO, INC.,

Plaintiff

versus

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, and ITS OUACHITA LOCAL 654,

Defendants

[Filed Apr. 18, 1984]

CROSS-MOTION FOR SUMMARY JUDGMENT OF PLAINTIFF, MISCO, INC.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff, Misco, Inc., hereby moves for Summary Judgment in this case. In support of its Motion, Plaintiff shows there is no genuine issue as to any material fact in this matter and that it is entitled to judgment as a matter of law. This Motion is based upon pleadings in this case and the attached Memorandum In Support of Plaintiff's Cross-Motion for Summary Judgment and In Opposition to Defendant Union's Motion To Dismiss and For Summary Judgment.

WHEREFORE, Plaintiff's Motion for Summary Judgment should be granted and an Order entered by this Court vacating the arbitration award in this case.

Dated this 17th day of April, 1984.

Respectfully submitted,

HUDSON, BOTTS & BERNSTEIN
Post Office Drawer 3008
Monroe, Louisiana 71210

By: /s/ A. Richard Gear
A. RICHARD GEAR
Attorneys for Plaintiff,
Misco, Inc.

(Certificate of Service Omitted in Printing)

EXHIBITS TO PLAINTIFF'S CROSS MOTION

[LOGO]

MISCO, INC.

August 5, 1982

Isiah Cooper

Subject: Written Reprimand
Reduction in Pay Rate

Isiah,

As discussed with you on August 3, concerning the substantial production problems with Technical Chemical, please be advised to the following.

Your operator's pay has been reduced to the 120 day rate for a period of 20 working days.

I would like to remind you that as an operator, it is your responsibility to read and fit the production orders up correctly.

It is also your responsibility to achieve on a continuous basis production standards if you expect to be paid at the high rate.

Zeke, perhaps that you will turn yourself around and mold yourself into the top notch rewinder operator that you are capable of becoming.

CHARLES COVINGTON
Production Manager

kk

[LOGO]

MISCO, INC.

January 20, 1983

TO: Isiah Cooper

SUBJECT: Written Reprimand
90 Day Probation
Rate cut for 20 working days

On January 13, 1983 you were instructed to set up and run an order for Consolidated Can, calling for 6 11/16" wide cuts. The order instructed you to check each and every coil as to the width because it was very critical. You ran five (5) sets of material with the outside coil measuring 6 9/16" wide, which was unacceptable and had to be rejected. Any operator can run one bad roll without his knowing of it, but to run five (5) sets is totally irresponsible. You are a responsible operator manning one of the prime pieces of equipment this company owns, to remain there you are going to have to become aware of what your job consists of. You were disciplined in July 1982 for another error in not following instructions. We can not allow this trend to keep happening. An operator with six years experience should not keep making these mistakes that cost the company money that it can not afford in these competitive times.

It has been decided by management to discipline you as follows:

1. Starting January 13, 1983 and through February 23, 1983 you will be paid at the 120 day rate.
2. Starting January 13, 1983 and through April 13, 1983 you will be placed on a 90 day probation period. During this time your work performance, attitude, and productivity will be monitored very closely.

Your continued employment with this company is in your hand, as one more mistake such as this will result in your being removed from this machine permanently.

CHARLES COVINGTON
Production Manager

CERTIFIED REPORT

RS. 15:499-501

Date 9-21-83 Lab No. ND-2090-86

NORTH LOUISIANA CRIMINALISTICS LABORATORY
1115 Brooks St.—Shreveport, La. 71101—227-2889

Agency Address	Metro Narcotics Unit P.O. Box 16 Monroe, La. 71201 Attn: Sgt. Royce Toney
Parish:	Ouachita
Date Submitted:	9-21-83
Hour Submitted:	3:29 PM
Submitted by:	Sgt. Royce Toney
Examination Requested:	Marijuana

Isiah W. Cooper, Jr.

Evidence Rec'd by: Susan T. Rutledge

Evidence Analyzed by: Susan T. Rutledge

/s/ Susan T. Rutledge

Lab Director: /s/ Ray Herd

Description of Evidence:

1. One (1) brown envelope containing one (1) plastic case containing vegetable matter.

Report: Analyzed 9-21-83

The vegetable matter in item #1 was determined to be marijuana.

PERMISSION FOR SEARCH AND SEIZURE

Date: 1-21-83 Time: 6:55 PM

In order to cooperate with members of law enforcement agencies in connection with an investigation being conducted by them, I, Isiah Cooper, residing at 603 Lidell St., Monroe, La., do hereby voluntarily authorize Sgt. D. McClanahan, Sgt. R. Toney, Metro Narc. Unit to search my vehicle (or other real estate) located at Misco Inc., Jackson St., Monroe, La., and my motor vehicle(s), namely my 1973 Pontiac license numbered 126E741, presently parked or located at Misco Parking Lot, Jackson St., Monroe, La. And I FURTHER AUTHORIZE these said Officers to remove from my said residence, real estate, and/or motor vehicle(s) whatever documents, articles, or other items of property whatsoever which they deem pertinent to their investigation, with the understanding, of course, that these Officers will give me a receipt for whatever they remove.

I AM GIVING THIS WRITTEN PERMISSION to these Officers freely and voluntarily without any threats or promises having been made to me and after having been informed by these Officers that I have the right to refuse to permit this search and seizure. It is my desire to assist the officers in their investigation by saving them the extra time it would take to obtain a Search Warrant and, for this reason, I have given my permission.

/s/ Isiah Cooper

WITNESSES:

/s/ Sgt. D. McClanahan

/s/ Sgt. R. Toney

Louisiana Revised Statute

§ 966. Penalty for distribution or possession with intent to distribute narcotic drugs listed in Schedule I; possession of marijuana

* * * *

D. Possession of marijuana. (1) Except as provided in Subsections E and F hereof, on a first conviction for violation of Subsection C of this Section with regard to marijuana, tetrahydrocannabinol or chemical derivatives thereof the offender shall be fined not more than five hundred dollars, imprisoned in the parish jail for not more than six months, or both.

(2) Except as provided in Subsections E and F hereof, on a second conviction for violation of Subsection C of this Section with regard to marijuana, tetrahydrocannabinol or chemical derivatives thereof the offender shall be fined not more than two thousand dollars, imprisoned with or without hard labor for not more than five years, or both.

(3) Except as provided in Subsections E and F hereof, on a third or subsequent conviction for violation of Subsection C of this Section with regard to marijuana, tetrahydrocannabinol or chemical derivatives thereof the offender shall be sentenced to imprisonment with or without hard labor for not more than twenty years.

Added by Acts 1981, No. 800, § 1, eff. Aug. 2, 1981.

E. (1) Except as otherwise authorized in this Part, any person who knowingly or intentionally possesses one hundred pounds or more, but less than two thousand pounds, of marijuana, tetrahydrocannabinol or chemical derivatives thereof, shall be sentenced to serve a term of imprisonment at hard labor of not less than five years, nor more than ten years, and to pay a fine of not less than twenty-five thousand dollars.

(2) Except as otherwise authorized in this Part, any person who knowingly or intentionally possess two thousand pounds or more, but less than ten thousand pounds, of marijuana, tetrahydrocannabinol or chemical derivatives thereof, shall be sentenced to serve a term of imprisonment at hard labor of not less than ten years, nor more than fifteen years, and to pay a fine of not less than fifty thousand dollars.

(3) Except as otherwise authorized in this Part, any person who knowingly or intentionally possesses ten thousand pounds or more of marijuana, tetrahydrocannabinol or chemical derivatives thereof, shall be sentenced to serve a term of imprisonment at hard labor of not less than fifteen years, nor more than twenty years, and to pay a fine of not less than two hundred thousand dollars.

Added by Acts 1981, No. 800, § 1, eff. Aug. 2, 1981.

F. (1) Except as provided in Paragraph (2) hereof, with respect to any person to whom the provisions of Subsection E are applicable, the adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for probation or parole prior to serving the minimum sentences provided by Subsection E.

(2) The district attorney may move the sentencing court to reduce or suspend the sentence of any person to whom the provisions of Subsection E are applicable who provided substantial assistance in the identification, arrest or conviction of other parties or conspirators to the crime for which he was convicted or to related crimes. The arresting agency shall be given an opportunity to be heard in reference to any such motion. The court may reduce or suspend the sentence if it finds that the defendant rendered such substantial assistance.

Added by Acts 1981, No. 800, § 1, eq. Aug. 2, 1981.

Occupational Safety and Health Act of 1970

29 U.S.C. § 654. Duties of employers and employees

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

Pub.L. 91-596, § 5, Dec. 29, 1970, 84 Stat. 1593.

STATE OF LOUISIANA
PARISH OF OUACHITA

AFFIDAVIT

I, Fred Billhorn, President of Misco, Inc., give the following statement:

Immediately after I received a copy of Arbitrator Fox's Opinion and Award, I telephoned International Paperworkers representative, James Dunn, and told him that I was disappointed in the Arbitration Award and that I was disappointed in the Union's stance in backing that employee because of his drug problem. I did tell Mr. Dunn that I would tell the people in Monroe about the Union's stand on this position, because I felt it was wrong. I did not say I would do everything I could to destroy or get rid of the Union or anything to that effect. I told Mr. Dunn that I would appeal the arbitrator's decision which I thought was wrong and thereby do everything I legally could to keep from putting Cooper back to work.

I personally am convinced that the reinstatement of Cooper would have a serious effect upon the younger employees in this plant by increasing and encouraging the possession or use of drugs on the Company premises. I feel that the arbitrator's award was misguided and is against common sense and public policy in controlling criminal drug problems in the work place.

I swear the foregoing statement is true and correct to the best of my knowledge and belief.

/s/ Fred Billhorn
FRED BILLHORN
President of Misco, Inc.

_____
(Address)

SWORN TO AND SUBSCRIBED before me, Notary, on this 16th day of April, 1984.

/s/ [Illegible]
Notary Public

STATE OF LOUISIANA
PARISH OF OUACHITA

AFFIDAVIT

I, Charles Covington, give the following statement:

I am the production manager of Misco, Inc. and am the same Charles Covington that testified before the arbitrator on September 26, 1983, in the matter of Isiah Cooper's discharge. I have read the arbitrator's decision at page 31 where he states that the Company presented nothing about our actions concerning the bottle of whiskey found in the white Cutlass on our parking lot. In fact, I did not learn about the whiskey bottle's presence in the vehicle until later, at the grievance meeting with the Union about a week after the discharge. I testified at the hearing that I attempted to investigate the presence of the whiskey bottle and as I could not establish the identity of the other two individuals in the car with Cooper, could take no action against them, and I also satisfied myself that the owner of the car, George Williams, had not been sitting in his car at the time of the incident and was not responsible for the whiskey bottle. I testified before the arbitrator that because of these factors, I took no disciplinary action with respect to the whiskey bottle.

I swear the foregoing is true and correct to the best of my knowledge and belief.

/s/ Charles Covington
CHARLES COVINGTON
Production Manager
of Misco, Inc.

_____
(address)

SWORN TO before me, this 16th day of April, 1984.

/s/ [Illegible]
Notary Public

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

Civil Action No. 83-2904

MISCO, INC.,

Plaintiff

versus

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, and its OUACHITA LOCAL 654,

Defendants

[Filed Oct. 23, 1984]

NOTICE OF APPEAL

Notice is hereby given that United Paperworkers International Union, AFL-CIO, and its Ouachita Local 654, defendants in the above captioned matter, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 24th day of October, 1984.

GARDNER, ROBEIN & HEALEY

/s/ Robert H. Urann (MHB)
ROBERT H. URANN
2540 Severn Avenue, Suite 400
Metairie, LA 70002
(504) 885-9994

/s/ Mark M. Brooks (MHB)
MARK M. BROOKS
United Paperworkers
International Union
P.O. Box 1475
Nashville, Tennessee 37202
(615) 834-8590

Supreme Court, U.S.
FILED
MAR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, *et al.*,

Petitioners,

v.

MISCO, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE PETITIONERS

LYNN AGEE
MARK BROOKS
3340 Perimeter Hill Drive
P.O. Box 1475
Nashville, TN 37202

MICHAEL GOTTESMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

DAVID SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

80

38pp

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. In An Action Under § 301, A Court May Not Set Aside An Arbitration Award On Public Policy Grounds Unless The Collective Bargaining Agreement, As Interpreted By The Arbitrator, Violates Positive Law	9
II. Even If The Public Exception Were Not Properly Limited To Cases Involving A Conflict With Positive Law, The Courts Below Erred In Vacating The Arbitration Award In This Case	25
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: Page

Allis-Chalmers v. Lueck, 471 U.S. 202 (1985).... 17
Amalgamated Meat Cutters v. Great Western Food Co., 712 F.2d 122 (5th Cir. 1983)..... 22, 26
American Steel Foundries v. Tri City Central Trades Council, 257 U.S. 148 (1921)..... 13
Belknap Inc. v. Hale, 463 U.S. 491 (1983)..... 18
Bowen v. United States Postal Service, 459 U.S. 212 (1983).....9, 19, 21
Boys Market v. Clerks Union, 397 U.S. 235 (1970)..... 19
Buffalo Forge Co. v. Steelworkers, 428 U.S. 397 (1976)..... 19
Carbon Fuel Co. v. Mine Workers, 444 U.S. 212 (1980)..... 15
Conley v. Gibson, 355 U.S. 41 (1957)..... 18
Electrical Workers Local 453 v. Itis Elevator Co., 214 F.2d 25 (2d Cir. 1963)..... 26
Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1974)..... 17
Golden State Transit Corp. v. City of Los Angeles, —— U.S. ——, 54 L.W. 4329 (April 1, 1986).. 18
H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970).... 14
John Wiley & Sons v. Livingston, 376 U.S. 543 (1964)..... 19, 21
Labor Board v. American Ins. Co., 343 U.S. 395 (1952)..... 13
Labor Board v. Insurance Agents, 361 U.S. 477 (1960).....13, 14, 18
Labor Board v. Jones & Laughlin, 301 U.S. 1 (1937)..... 13
Machinists v. Wisconsin Empl. Rel. Comm'n, 427 U.S. 132 (1976)..... 18
Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)..... 17
NLRB v. Acme Industrial Co., 385 U.S. 432 (1967)..... 18
NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984)..... 13

TABLE OF AUTHORITIES—Continued

Page

Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) 20
Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960) 10, 19, 22
Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960) 17, 19, 20
Teamsters Union v. Oliver, 358 U.S. 283 (1959) 14, 17
Teamsters Local v. Lucas Flour Co., 369 U.S. 95 (1962) 13, 19, 20
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 12, 24
UMWA Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982) 15, 16
United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) 19
United States Postal Service v. Letter Carrier, 789 F.2d 18 (D.C. Cir. 1986) 23
W. R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983) 6, 8, 10, 25, 27, 28

STATUTES:

La. Rev. Stat. § 966(D) 26
Labor Management Relations Act of 1947:
§ 203(d), 29 U.S.C. § 173(d) 19
§ 301, 29 U.S.C. § 185 ..... *passim*
National Labor Relations Act, as amended, 29 U.S.C. §§ 151 *et seq.*: ..... *passim*
§ 8(d), 29 U.S.C. § 158(d) 18

MISCELLANEOUS:

BNA, Labor Arbitration Cumulative Digest and Index Covering Volumes 71-80 (1984) 3
Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91 (1966) 21
Elkouri & Elkouri, *How Arbitration Works* (4th ed. 1985) 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-651

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, *et al.*,

Petitioners,

v.

MISCO, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported at 768 F.2d 739, and is reprinted in the appendix to the petition for a writ of certiorari ("Pet. App.") at 1a-13a. The opinion of the United States District Court for the Western District of Louisiana is unreported, and is printed at Pet. App. 16a-24a. The Arbitrator's award at issue is unreported, and is printed at *id.* 25a-53a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 19, 1985. Pet. App. 1a, 7a. A timely petition for rehearing was denied on June 3, 1986. *Id.* 14a-15a. On August 13, 1986, Justice White signed an order extending the time for filing a petition for a writ of certiorari to and including October 1, 1986. *Id.* 54a. On September 22, 1986, Justice White signed an order further extending the time for filing a certiorari petition to and including October 20, 1986. *Id.* 56a. This petition was filed on that date. On January 12, 1987, this Court granted the petition and issued a writ of certiorari. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Company (respondent) and Unions (petitioners) were, at all times relevant here, parties to a collective bargaining agreement covering the production and maintenance employees at the Company's plant in Monroe, Louisiana.[1] The agreement contained a typical grievance-

---

[1] Petitioner United Paperworkers International Union, AFL-CIO ("UPIU") is the exclusive bargaining representative of the employees. Petitioner Ouachita Local 654 is affiliated with UPIU. UPIU and the local both were parties to the collective bargaining agreement with the Company.

arbitration provision entitling the Unions to take to arbitration any grievance "arising out of the interpretation or application of the terms of this Agreement." J.A. 15. The agreement declared that the arbitrator's decision "shall be final and binding to both parties of this Agreement." *Id.* 20.

On February 7, 1983, the Company discharged Isiah Cooper, an employee covered by the collective bargaining agreement. Cooper was alleged to have violated a rule promulgated by the Company which listed among the "causes for discharge":

> Bringing intoxicants, narcotics, or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics, or controlled substances. [Pet. App. 31a.]

A grievance was filed protesting the discharge. J.A. 23. The Company responded to the grievance by asserting that Cooper had "violated company rules in being in a car with a lit marijuana cigarette" and it was on that basis that the Company sought to justify the discharge in the grievance procedure. *Id.* 23. The parties were unable to resolve the grievance and the Unions therefore took the matter to arbitration. Under the auspices of the Federal Mediation and Conciliation Service, the parties selected as arbitrator Milden J. Fox, Jr., a professor of industrial engineering at Texas A&M University and an experienced labor arbitrator.[2]

Arbitrator Fox held a hearing on September 26, 1983. The parties stipulated the issue for resolution to be whether "the Company ha[d] just cause to discharge the grievant." Pet. App. 26a. By an opinion dated October 31, 1983, the Arbitrator answered that question in the negative and sustained the grievance.

---

[2] *See* BNA, Labor Arbitration Cumulative Digest and Index Covering Volumes 71-80 (1984), pp. 857-58.

The Arbitrator began his reasoning from the traditional labor-arbitration rule that an employer has the burden of proving that a discharge is for just cause. Pet. App. 42a[3] In this case the Arbitrator found that "the only thing the Company has proven is that [Cooper] was sitting in the back seat of a car in which there was found a lit marijuana cigarette in the front seat ashtray, a front seat just moments before vacated by another Company employee." *Id.* 50a. "No [witness] testified that he saw anyone smoking a marijuana cigarette," even though the police, with the aid of binoculars, had been observing Cooper during the entire time he was in the car in which the marijuana cigarette was found. *Id.* 49a.[4] Thus, while acknowledging that had the Company proved the charge against Cooper "the Employer's position" would be "reasonable," *id.* 45a, the Arbitrator found that "the Company had not proved by any level of evidence that the Grievant was in violation of the Rule," *id.* 51a. The Arbitrator accordingly ordered that Cooper be reinstated to "his old job or an equivalent job" and be "made whole for lost earnings." *Id.* 52a-53a.

In entering this award, the Arbitrator recognized that, at the arbitration hearing, the Company had, for the first time in the grievance-arbitration procedure, offered evidence of a separate event, of which the Company had not previously been aware, and which was therefore concededly not a basis for the Company's discharge decision: on the day of the incident for which Cooper was discharged, the police had searched Cooper's own car (a

---

[3] *See* Elkouri & Elkouri, *How Arbitration Works*, p. 661 (4th ed. 1985) ("the burden is generally held to be on the employer to prove guilt of wrongdoing").

[4] Cooper was under surveillance by police officers who, had obtained a warrant to search Cooper's home. Cooper ultimately pleaded guilty to a charge of possession of marijuana in his home. The district attorney expressly declined to prosecute Cooper for either possession or use of the marijuana cigarette that was found in the car from which Cooper had exited. Pet. App. 8a, 34a-35a, 40a, 50a-51a.

different car from that in which he was sitting prior to arrest) and had found a plastic bag containing marijuana "gleanings" in a microscopic quantity too small to be usable. *Id.* 37a, 46a. In accordance with the often-followed arbitral rule that "the Company must have its proof in hand before it takes disciplinary action against an employee," *id.* 47a,[5] the Arbitrator refused to consider this evidence in determining whether just cause had been established for the discharge. The Arbitrator explained that "[a]n employee should know the offense with which he is charged and have the opportunity to defend his behavior" prior to the arbitral hearing, *id.* 45a, and that an employer should not be allowed to "take the disciplinary action and then spend eight months digging up supporting evidence to justify its actions," *id.* 47a. And this rule, said the Arbitrator, applied with especial force in the instant case as the Company "had a good opportunity to find out about the gleanings evidence," and had failed to do so because of the negligence of one of the Company's supervisors. *Id.*

The Company refused to comply with the arbitration award, but, instead, instituted this lawsuit against the Unions, under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, seeking an order vacating the award. In its complaint, the Company alleged, *inter alia*, that the award contravenes public policy. J.A. 4, 6. The Unions filed a counterclaim seeking enforcement of the arbitration award. *Id.* 10-12.

On cross motions for summary judgment, the District Court ruled for the Company and vacated the Arbitrator's award. The Unions appealed and a divided panel of the Fifth Circuit affirmed; the majority agreed with the District Court that the presence of marijuana gleanings in a bag in Cooper's car meant that the arbitral award

---

[5] *See* Elkouri & Elkouri, *supra* n.3, at pp. 675-76 (discharge " 'must stand or fall upon the reason given at the time of discharge'; other reasons may not be added when the case reaches arbitration").

reinstating Cooper contravened the "public policy . . . against the operation of dangerous machinery by persons under the influence of drugs and alcohol," Pet. App. 7a:

> The arbitrator in today's case, focusing chiefly on his conception of "industrial due process," ruled for Cooper in great part because the employer did not at the time it discharged him know of the marijuana residue that he undeniably brought onto the plant parking lot.
>
> . . . [H]is narrow focus on Cooper's procedural rights has led him to enter an award directing the employer to put Cooper back to operating a hazardous machine, dangerous to himself and to others, at a time when the arbitrator knew that in fact Cooper *had* brought drugs onto company premises, in violation of Louisiana law and of a clearly-stated company rule. The public policy involved today is . . . one against the operation of dangerous machinery by persons under the influence of drugs or alcohol. Gazing at the trees, and oblivious of the forest, the arbitrator has entered an award that is plainly contrary to serious and well-founded public policy. [Pet. App. 7a; emphasis in opinion].

On January 12, 1987, this Court granted a writ of certiorari to review the Fifth Circuit's decision.

SUMMARY OF ARGUMENT

The Arbitrator in this case, without in any way protecting, authorizing, condoning or sanctioning the possession or use of marijuana by employees, interpreted the just cause requirement of the collective bargaining agreement to demand proof that a discharged employee did commit the offense for which he was discharged (and not some subsequently-discovered offense). It is undisputed that this award " 'draws its essence from the collective bargaining agreement" and that the courts below were "bound to enforce the award" unless the award "violates some explicit public policy." *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 764, & 766 (1983).

The public-policy question that is posed here arises in a common situation in labor-management relations: a situation in which public law allows a broad employer discretion in making employment decisions but the employer has agreed in collective bargaining to certain contractual limits on that discretion. The question presented is whether, without securing a modification in the collective agreement through negotiations with the union, the employer, by operation of the federal law of labor contracts, may escape the contractual limits to which the employer agreed and reclaim the very discretion that the collective agreement is designed to limit.

In Part I we show that the national labor policy—which provides the source of the law to be applied in cases, like the instant one, involving the rights and duties of parties to collective bargaining agreements—compels a negative answer to that question and requires the conclusion that an arbitration award may be set aside as against public policy only if the award gives the collective agreement an interpretation that violates positive law. This is true for two reasons: first, only such a rule protects the labor law's preference for private decision-making—in the area left open by public law—to fix the terms and conditions of employment, pp. 13-17 *infra*; and second, only such a rule protects the labor laws' preference for arbitration, rather than economic warfare, as the means of resolving labor-management disputes that arise as to the meaning or application of a collective agreement, pp. 17-24 *infra*. The courts below thus erred in vacating the Arbitrator's award, as that award requires the Company to take an action that the Company is lawfully permitted to take, and does so by reason of the conclusion that the contract establishes requirements the parties were entirely free to establish. Pp. 24-25 *infra*.

In Part II we show that even if the Court were to conclude that the public policy exception to the enforcement of abritration awards is not limited to cases in

which the award conflicts with positive law, the courts below nonetheless erred in vacating the arbitration award in this case.

Under *W.R. Grace* to justify vacating an arbitration award on public policy grounds, the award must give the contract an interpretation that "violates some explicit public policy," one that is "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" 461 U.S. at 766. The court below relied on what it termed the "public policy . . . against the operation of dangerous machinery by persons under the influence of drugs or alcohol." Although that court did not point to any statutory source for the policy, we may assume that the policy rises to the level of an "explicit public policy" within the meaning of *W.R. Grace*. Even on that assumption, the decision below is erroneous, for the Arbitrator's award does not in any sense "violate" that policy.

Without questioning the Company's right to discharge employees who report to work "under the influence of drugs or alcohol," the Arbitrator here found no proof of such a wrong and directed reinstatement of Cooper to "his old job or an equivalent job for which the Grievant is qualified." To conclude that the award violates public policy, the court below assumed: that the job to which Cooper would be reinstated would involve the operation of dangerous machinery; that the Company would lack the means to monitor or supervise Cooper's job performance; and most important of all, that Cooper would report to work under the influence of drugs. None of these assumptions is supported by the record in this case. In particular, the Fifth Circuit's decision rests either on speculation as to Cooper's past conduct or on predictions of future misconduct going far beyond anything in this record. In either event, under *W.R. Grace* far more must be shown before an arbitration award can be found to violate public policy. Pp. 25-30 *infra*.

ARGUMENT

I. In An Action Under § 301, A Court May Not Set Aside An Arbitration Award On Public Policy Grounds Unless The Collective Bargaining Agreement, As Interpreted By The Arbitrator, Violates Positive Law

A. The issue in this case arises in a quite common labor relations context. Like most collective bargaining agreements, the contract between the Unions and the Company here provides a grievance procedure for resolving "[a]ny dispute . . . arising out of the interpretation or application of the terms of this Agreement." J.A. 15. That procedure culminates in arbitration, before "an impartial arbitrator," of any grievance the parties are unable to resolve, *id.* 18-19; the arbitrator's task is to resolve grievances under the contract and he is expressly denied any "power to add to, subtract from or modify any of the terms of the Agreement" or "to substitute his discretion for the employer's discretion in cases where the employer is given discretion by this Agreement," *id.* 19. Thus, as is the norm, the arbitrator is "confined to interpretation and application of the collective bargaining agreement." *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 596 (1960). And by the terms of the collective agreement, "[t]he decision of the arbitrator shall be final and binding to both parties of this Agreement." J.A. 20. The arbitral process thus "provides the parties with a means of giving content to the collective bargaining agreement and determining their rights and obligations under it." *Bowen v. United States Postal Service*, 459 U.S. 212, 225 (1983).

In this case, the Arbitrator, acting pursuant to his authority, concluded that the collective agreement places certain limits on the Company's prerogatives in discharging employees. In particular, the Arbitrator, on the basis of the parties' stipulated statement of the issues, recognized that the agreement allows discharge only for just

cause, and further refined that prohibition by interpreting "just cause" in accord with its ordinary meaning in the labor contract context, *see* n.5, p. 5, *supra*, as requiring proof that the employee committed the offense for which the employee was discharged (and not some subsequently-discovered offense). Based on that interpretation of the agreement—and based on a factual determination that the Company had failed to prove that Cooper was guilty of the offense charged—the Arbitrator concluded that Cooper's discharge was in breach of contract and the Arbitrator ordered the Company to reinstate Cooper with backpay.

As a general rule, so long as an arbitral award " 'draws its essence from the collective bargaining agreement,' a court is bound to enforce the award." *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 764 (1983). The Arbitrator's award here plainly meets the requirements of that general rule. The award therefore conclusively establishes the meaning of the collective agreement, as "the question of interpretation . . . is a question for the arbitrator;" the "courts have no business overruling him because their interpretation of the contract is different from his." *Steelworkers v. Enterprise Corp.*, *supra*, 363 U.S. at 599.

In *W. R. Grace*, the Court recognized a limited exception to the general rule favoring the enforcement of labor arbitration awards: "if the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it." 461 U.S. at 766. The question "of public policy is ultimately one for resolution by the courts." *Id.* And it is the sole question presented herein.

In seeking the answer to that question, we start with certain propositions that are common ground.

First, the Arbitrator has *not* interpreted the collective agreement's just cause requirement to preclude the Com-

pany from discharging an employee for reporting to work under the influence of drugs, for using marijuana during work time, or, even, for possessing marijuana on company property, assuming that the Company is able to prove that the individual is guilty of the offense charged. All that the Arbitrator has held is that to sustain a discharge the Company must prove the offense which was the basis of the discharge, and that the Company failed to meet that burden here.

Second, it is undisputed that the Company was legally free to agree—or not to agree—to a collective agreement containing the restrictions in the contract here as interpreted by the Arbitrator; in other words, the contract, as construed by the Arbitrator, does not offend any legal rule.

Third, it is equally clear that the Company is legally free through collective bargaining to seek to remove the restrictions placed on its employer prerogatives by the present collective agreement.

Finally, there is no doubt that for so long as the collective agreement, as interpreted by the Arbitrator, remains in force, the Company is legally free to abide by that agreement; the Company was not required by any public law to discharge Cooper nor is there any legal prohibition on reemploying him with backpay.

We are faced here, then, with a common situation in labor-management relations: a situation in which public law allows a broad employer discretion in making employment decisions but the employer has agreed, in collective bargaining, to certain contractual limits on that discretion. The question presented is whether, without securing a modification in the collective agreement through negotiations with the union, the employer, by operation of the federal law of labor contracts, may escape the contractual limits to which he agreed and reclaim the very discretion in setting and in implementing employment

conditions that the collective agreement is designed to replace with a set of rules mutually agreed to.

The lower courts answered that question in the affirmative holding that, notwithstanding an employer's contractual undertaking, it is against public policy to compel the employer to retain an employee who has brought "marijuana gleanings" onto the employer's parking lot. The lower courts based their decision on the premise that the judiciary may refuse to enforce a labor arbitration award in situations where the contract itself, as interpreted by the arbitrator, is entirely lawful and the award can be lawfully implemented, but the award requires some action which, in the court's view, diserves some public policy; in this case "[t]he public policy . . . against the operation of dangerous machinery by persons under the influence of drugs or alcohol." P. 6, *supra.*

As we proceed to show, this assumption is incorrect; the proper rule in cases arising under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185—the one required by the national labor policy—is that an arbitration award may be set aside as against public policy only if the award gives the collective agreement an interpretation that violates positive law.

B. Because the question presented here arises under § 301 and concerns the rights and duties of parties to a collective bargaining agreement, "the substantive law to apply," as this Court held in *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957), "is federal law, which the courts must fashion from the policy of our national labor laws." More specifically, where, as here, the issue presented is one as to which "express statutory sanction is lack[ing]," the Court's task is to "look[] at the policy of the legislation and fashion[] a remedy that will effectuate that policy." *Id.* at 457.

1. (a) In enacting the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("NLRA" or "the Act"), "Con-

gress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of employment." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 835 (1984). Recognizing that "a single employee [i]s helpless in dealing with [his] employer," *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 148, 209 (1921), Congress endeavored, through the NLRA, to foster a process of collective bargaining which would redress the inequality of bargaining power that exists where employees confront their employers individually, and at the same time would "promote[] industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers," *Labor Board v. American Ins. Co.*, 343 U.S. 395, 401 (1952).[6]

"[A]bsent a collective bargaining agreement," management "hires and fires, pays and promotes, supervises and plans . . . freely except as limited by public law and by the willingness of the employees to work under the particular, unilaterally imposed conditions." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 583 (1960). Employees thus engage in collective bargaining in order to secure legally-enforceable rights which will "regulate or restrict the exercise" of management's otherwise un-

---

[6] *See also, e.g., Labor Board v. Jones & Laughlin*, 301 U.S. 1, 45 (1937) ("The theory of the Act is that free opportunity for negotiations with accredited representatives of employees is likely to promote industrial peace"); *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962) ("The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace"); *Labor Board v. Insurance Agents*, 361 U.S. 477, 488 (1960) ("the policy of Congress is to impose a mutual duty upon the parties to confer in good faith . . . in the belief that such an approach from both sides of the table promoted the overall design of achieving industrial peace").

fettered prerogatives. *Id.* Because employers generally seek to preserve their prerogatives, the collective bargain-in grelationship is an adversarial one in which the parties "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." *Labor Board v. Insurance Agents, supra*, 361 U.S. at 488.

Nothing in the Act seeks to dictate a particular resolution of this conflict between labor and management or to dictate in which respects (if any) management's powers will be limited by contract. As this Court has stated, "the fundamental premise on which the Act is based [is] *private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.*" *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (emphasis added). "The goal of federal labor policy" is thus "to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations. . . . The purposes of the Act are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves." *Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959).[7]

A corollary of the national labor policy's strong emphasis on private decision-making in the establishment of terms and conditions of employment is a corresponding limitation on the role of the judiciary in § 301 cases. The Court enunciated this liimtation in *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982): "when neither the collective bargaining process

---

[7] *See also, e.g., Labor Board v. Insurance Agents, supra*, 361 U.S. at 488 ("Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences"); *H. K. Porter Co. v. NLRB, supra*, 397 U.S. at 108 ("the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties").

nor its end product violates any command of Congress, *a federal court has no authority to modify the substantive terms of a collective bargaining contract*" (emphasis added). *See also Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 219 (1980) ("If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution").

(b) The expansive public policy exception adopted by the court below—an exception that allows courts to refuse to enforce *lawful* collective bargaining agreements—flies in the teeth of the policy favoring free collective bargaining. If a collective agreement (as interpreted by an arbitrator) is lawful, then, by hypothesis, the employer is, as a matter of public law, free to act in conformity with the agreement, or to act in the opposite manner. To refuse to enforce an award compelling compliance with the agreement thus substitutes for a rule negotiated through the collective bargaining system, a regime in which the employer exercises absolute and unlimited power. It is difficult to understand what public policy it is that is advanced by vesting such discretion in employers. And it is beyond dispute that the *national labor policy* is fundamentally undermined by the failure to honor the parties' collectively-bargained resolution of an issue they were free to resolve, and by the return to the employer of the very unfettered discretion the collective agreement is designed to limit.

The instant case illustrates the point well. Under the NLRA, the parties had a duty to bargain over the subject of when and how employees would be discharged. The parties did so, and reached an entirely lawful resolution of that matter; a resolution that imposed certain limitations on *all* discharges. Yet the lower courts have held that in certain categories of cases—at least those involving possession or use of drugs or alcohol—the parties' contract is not enforceable, and that the employer

in such cases is free to decide on its own whether to discharge or otherwise discipline the employee.

In so doing, it must be emphasized that the lower courts did *not* preclude the Company, or any other employer, from employing Cooper, or any similarly-situated employee, to operate dangerous machinery. To the contrary, this Company, and all other employers, remain free to employ (or reemploy) such persons at will. The decision below thus may have no effect whatsoever on the types of jobs held by persons found possessing marijuana. Nor did the courts below even require the Company, or employers generally, to demonstrate, as a precondition to overturning an arbitral award, that the discharge at issue was based on the use of marijuana in a way that affects the employee's job performance or, indeed, on actual use at all. Under the decision below, possession of any amount of marijuana or alcohol, for any reason, at any time sufficies to subject the employee to unlimited employment discipline if that is the employer's will. The decision below thus assures, in such circumstances, that employees will have no legally-enforceable rights, but rather will be subject to their employer's judgment, whatever it is. In this way the public policy exception adopted by the courts below cuts deeply into the core aim of the national labor policy: to subject matters having to do with the terms and conditions of employment to the mediating influence of collective bargaining.

The same adverse consequences do not flow from recognizing a public policy exception under which the courts refuse to enforce arbitration awards only where those awards render the collective agreement itself unlawful. Nothing in the national labor policy requires a court to enforce a contract wihch "violates any command of Congress" or any command of a state legislature acting within the scope of its authority. *UMWA Health & Retirement Funds v. Robinson, supra*, 455 U.S. at 576. Absent a collective agreement, an employer's prerogatives

are "limited by public law," *Steelworkers v. Warrior & Gulf, supra*, 386 U.S. at 583, and the national labor policy "does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal," *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985).[8] Thus, § 301 comfortably accommodates a public policy exception that makes an arbitral award unenforceable where the arbitrator's interpretation of a labor contract renders the contract *unlawful*.

2. The broad public policy exception embraced by the courts below offends a second core aspect of the national labor policy: the "strong federal policy favoring arbitration of labor disputes." *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 382 (1974). This preference for arbitration rests on basic principles concerning the administration of collective bargaining agreements which we now elaborate.

Under the NLRA, the collective bargaining process does not come to an end when the collective agreement has been negotiated; far from it. Although the "labor agreement may attempt to regulate all aspects of the complicated relationship [between employer, employee and union] from the most crucial to the most minute over an extended period of time," the "breadth of the matters covered as well as the need for a fairly concise and readable instrument" assure that the contract will not self-evidently answer all questions of labor-management relations that arise during its term. *Steelworkers v. Warrior & Gulf Co., supra*, 363 U.S. at 580. Disputes as to how (or even whether) the collective agreement is to be applied to various disputes are inevitable.

---

[8] The national labor policy does have something to say about the extent to which the states are free to overide the substantive terms of a collective bargaining agreement. *Compare, e.g., Teamsters Union v. Oliver, supra, with Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985). There is no occasion to address that issue here, however, as it is undisputed that the arbitral award in this case does *not* violate Louisiana law.

For that reason, "[c]ollective bargaining is a continuous process." *Conley v. Gibson*, 335 U.S. 41, 46 (1957). NLRA § 8(d), 29 U.S.C. § 158(d), obligates the parties to "confer in good faith" not only "with respect to . . . the negotiation of an agreement" but also "with respect to . . . any question arising thereunder." That duty extends to "day-to-day adjustments in the contract and other working rules, the resolution of new problems not covered by existing agreements, and the protection of employee rights secured by contract." *Conley v. Gibson*, *supra*, 335 U.S. at 46.[9]

In theory, the ongoing nature of the collective bargaining process could mean ongoing economic strife. This is true for a very simple reason: "the use of economic pressure . . . is part and parcel of the process of collective bargaining," *Labor Board v. Insurance Agents*, *supra*, 361 U.S. at 494; "economic pressure devices" are the means by which each party in collective bargaining "make[s] the other party incline to agree on one's terms," *id.* at 489.[10] Thus, it would be entirely consistent with the labor laws' emphasis on collective bargaining for each problem that arises during the term of a collective agreement—for example, each discharge or each disciplinary action—to become the occasion for a strike, slowdown, or lockout.

---

[9] *See also, e.g., NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967) ("The duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement").

[10] *See also, e.g., Machinists v. Wisconsin Empl. Rel. Comm'n*, 427 U.S. 132, 147 (1976) ("Resort to economic weapons should other peaceful measure not avail is the right of the employer as well as the employee"); *Belknap Inc. v. Hale*, 463 U.S. 491, 500 (1983) ("the federal law intended to leave the employer and union free to use their economic weapons against one another"); *Golden State Transit Corp. v. City of Los Angeles*, —— U.S. ——, 54 L.W. 4329, 4331 (April 1, 1986) ("The parties' resort to economic pressure [i]s a legitimate part of their collective bargaining process").

To minimize that possibility, "the basic policy of national labor legislation," stated in LMRA § 203(d), 29 U.S.C. § 173(d),[11] "is to promote arbitration as a substitute for economic warfare." *Teamsters Local v. Lucas Flour Co., supra*, 369 U.S. at 105. The arbitral system allows disputes to be resolved under the "rule of law" rather than "leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength at any given moment of the contending forces." *Steelworkers v. Warrior and Gulf Co., supra*, 363 U.S. at 580. Arbitrators thus serve "as indispensible agencies in [the] continuous collective bargaining process," *Steelworkers v. Enterprise Corp., supra*, 363 U.S. at 597; through arbitration "meaning and context are given to the collective bargaining agreement," *Steelworkers v. Warrior & Gulf Co., supra* 363 U.S. at 591.[12]

Once again, this "strong congressional preference for private dispute settlement mechanisms agreed upon by the parties," *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397, 407 (1976), implies a corresponding limitation on the judicial role. As stated in *Warrior & Gulf*, the "judiciary sits in these cases to bring into operation an arbitration process which substitutes a regime of peaceful settlement for the older regime of industrial conflict." 363 U.S. at 585. This aim "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play," for "[a]rbitration is a stabilizing in-

---

[11] LMRA § 203(d) provides:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

[12] *See also, e.g., Boys Market v. Clerks Union*, 397 U.S. 235, 251-52 (1970); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 549 (1964); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 63 (1981); *Bowen v. United States Parcel Service, supra*, 459 U.S. at 224-25.

fluence only as it serves as a vehicle for handling any and all disputes that arise under this agreement." *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960).

(b) If, as the courts below held, the judiciary were free under § 301 to invoke public policy to refuse to enforce arbitral awards which do not violate positive law, the federal policy favoring "arbitration as a substitute for economic warfare," *Teamsters Local v. Lucas Flour Co., supra*, 369 U.S. at 105, would be gravely disserved. Under such a regime, there would be a category of labor-management disputes (for example, disputes over the discipline of an employee accused of marijuana possession) in which the resolution desired by the union (reinstatement) would be entirely lawful but in which, regardless of the merits of its contract position, the union would be unable to secure the relief sought through the "rule of law" because that relief, in the judiciary's view, disserved public policy. In such cases, the *only* avenue open to the union to press its lawful position—to secure reinstatement—would be economic warfare. Necessarily, such a regime would at the very least lead to increased labor strife in cases falling within this category, *viz.*, cases covered by the expansive public policy exception.[13]

---

[13] In this respect, the consequences of holding a collective bargaining agreement to be contrary to public policy are typically quite different from the consequences of such a holding with respect to other types of contracts.

Outside of the collective bargaining context, "[w]hen most parties enter into contractual relationships they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties." *Steelworkers v. Warrior & Gulf Co., supra*, 363 U.S. at 580. It follows that, in other contexts, where a contract is deemed violative of public policy, the parties are free to walk away from each other or, if they mutually desire, to negotiate a new agreement in the normal way voluntary agreements are reached.

In the labor context, however, "[t]he choice is generally not between entering or refusing to enter into a relationship, for that in

Moreover, the end result of the theory adopted by the lower courts would be to greatly reduce the overall utility of arbitration as a means of resolving labor disputes generally. To borrow words Archibald Cox wrote in a different context, the public policy exception, as defined by the courts below, "once loosed, is not easily cabined." [14] If courts were free to refuse to enforce arbitration awards based on the judiciary's own views of whether the award disserved a recognized public policy, it would be all too easy for the courts, in the guise of applying this exception, to second-guess arbitrators concerning their factual findings and contract interpretations.

That may well be the best explanation for the result reached by the court below; its opinion is dripping with contempt for the Arbitrator's conclusion that Cooper had not been proven to be guilty of the offense, possessing a lit marijuana cigarette, with which he was charged by the Company. *See* Pet. App. at 1a, 3a, n.2, 7a. And it is difficult to believe that it was the mere presence of marijuana gleanings in a bag in Cooper's car that led that court to conclude that Cooper's reinstatement offended public policy. Other appellate court opinion in which arbitral awards have been vacated on public policy grounds likewise contain strong indications that, at bottom, the

---

all probability preexists the negotiation," *id.*; thus the collective agreement "is not in any real sense the simple produce of a consensual relationship," *John Wiley & Sons v. Livingston, supra,* 376 U.S. at 550. And if a collective agreement were deemed violative of public policy, the parties still would be *obligated* to deal with each other and in doing so would have to confront each other's economic power in resolving the matter at hand.

Thus here, as in so many other areas arising under § 301, "principles of ordinary contract law" do not provide a nice fit. *See Bowen v. United States Postal Service, supra,* 459 U.S. at 224.

[14] Cox, *Constitutional Adjudication and the Promotion of Human Rights,* 80 Harv.L.Rev. 91, 91 (1966).

courts differed with the manner in which the arbitrator had found the facts and/or construed the contract.[15]

In all events, at least this much is clear: the amorphous public policy exception adopted by the lower courts leaves a great deal of room for such second-guessing of arbitration decisions, and would in that way "make meaningless provisions that the arbitrator's decision is final, for in reality it would almost never be final." *Steelworkers v. Enterprise Corp.*, *supra*, 363 U.S. at 599. And an arbitral system whose results are not final is unlikely to survive as a means of labor dispute resolution.

In addition, regardless of whether the courts were to resist this temptation to second-guess arbitration, it nonetheless would be true that under the Fifth Circuit's ex-

---

[15] For example, in *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983), the prior Fifth Circuit decision involving the public policy exception which the court below relied on in this case, that court concluded that "an award which compels the reinstatement to driving duties of a truck driver who admittedly drank while on duty, would violate . . . public policy"; specifically, "the public policy of preventing people from drinking and driving." *Id.* at 125.

But all that the arbitrator in that case had found the grievant "admitted" was "tak[ing] a drink at his last preceding rest stop" where grievant had spent the night at the end of the first day of his Fort Worth to California trip; indeed the grievant's testimony, as recited by the arbitrator, was that the grievant had taken his last drink more than five hours before resuming driving. (We are lodging a copy of the arbitrator's decision in *Great Western Food* with the Clerk of the Court.) And while the Fifth Circuit in *Great Western Food* correctly stated that grievant had been "cited . . . for 'drinking intoxicating liquor while on duty or within 4 hours prior,'" 712 F.2d at 123, that court failed to note the arbitrator's finding that "the drinking on duty charge" had been "dismiss[ed]" in a prior judicial proceeding.

Thus, the premise on which the Fifth Circuit vacated the arbitral award in *Amalgamated Meat Cutters*—that the grievant had been drinking while on duty—is not consistent with the facts as found by the arbitrator.

pansive public policy exception, there would be countless arbitral awards which could be said to raise a public poilcy issue, and in which the outcome of a challenged based on that issue could not be predicted by the parties with any degree of certainty. In these circumstances, there would be a strong temptation for the losing party in arbitration to resist the award and to shop for a favorable judicial decision.[16] Thus, regardless of the outcome of particular cases, the indefinite nature of the public policy exception adopted by the lower courts would undermine the finality of arbitral awards, thereby further diminishing the value of the arbitral process.

These results would *not* follow if the public policy exception were confined to cases in which the arbitral award rendered the contract unlawful. Such an exception would be subject to objective application and review and thus would not invite large numbers of challenges to arbitration decisions. Nor could such an objective rule be used, *sub silentio*, as a means of second-guessing arbitration awards. And, under such an exception, the only category of cases in which arbitration would not be available to a

---

[16] *United States Postal Service v. Letter Carriers*, 789 F.2d 18 (D.C. Cir. 1986), is illustrative. In that case, the arbitrator held that a provision in the collective bargaining agreement requiring management to exercise its authority "consistent with applicable laws" required management to comply with a Tennessee statute under which employees called for jury duty are to be paid their regular wages by their employer. Relying on cases such as the decision below in the instant case which gave a sweeping reading to the public policy exception, the Postal Service refused to comply with the arbitration award, contending, *inter alia*, that the award "is contrary to a well-defined policy . . . under which the Postal Services' operations are not to be subjected to a patchwork of conflicting state laws." *Six years* after the employee's grievance was filed, the District of Columbia Circuit rejected the Postal Service's argument and enforced the arbitration award.

union as a means of securing a desired end would be cases in which the end being sought is itself unlawful, and thus could not be secured through *any* means. Accordingly, a public policy exception limited to cases of illegality would not undermine the national labor policy's preference for arbitration as a means of resolving labor disputes whereas the broader exception advanced by the courts below does threaten that policy.

3. In sum, the rule that best "effectuate[s]" the national labor policy, *Textile Workers v. Lincoln Mills*, *supra*, 353 U.S. at 457, in this: an arbitration award is not to be vacated on public policy grounds unless the award interprets the collective bargaining agreement in a manner that renders the agreement unlawful. Such a rule protects the free collective bargaining system and the federal preference for arbitration as a means of dispute resolution. And such a rule, at the same time, leaves it open to Congress, and to the states within the limits of their powers, to regulate the employment relationship —for example, to proscribe the employment of certain categories of persons or to establish licensing or other prerequisites for certain jobs—and thereby to override private agreements. But within the parameters left open by public law, private parties would be free, in collective bargaining, to reach their own agreements and, so long as the agreement is lawful, to enforce their contract rights through the grievance-arbitration machinery.

C. Under the rule just stated, the courts below erred in vacating the Arbitrator's award here. The Arbitrator entered an award that requires the Company to take an action that the Company is lawfully permitted to take (and that the Union could have exerted economic pressure to secure): reinstating Cooper. Nothing in federal law, or in Louisiana law, makes it unlawful to employ or reemploy one who has possessed marijuana on

(or off) an employer's premises. The Company was not required to discharge Cooper originally and the Company is not precluded from reinstating him.

The Arbitrator entered the challenged award based on his conclusions: that the collective agreement requires proof of the offense for which the employee was discharged; and that evidence of an employee's presence in the back seat of a car, the front seat of which had recently been vacated by another individual and the front ashtray of which contains a marijuana cigarette, does not established that the discharged employee possessed the marijuana. Neither of these conclusions is inconsistent with positive law; the parties were entirely free to reach a collective agreement that placed such limits on the Company's discharge power and it was the Arbitrator's judgment that the parties, in fact, had done so. Accordingly, the award should be enforced.

II. Even If The Public Policy Exception Were Not Properly Limited To Cases Involving A Conflict With Positive Law, The Courts Below Erred In Vacating The Arbitration Award In This Case

If the Court were to conclude, contrary to our argument in Part I, that the public policy exception is not limited to cases in which an arbitration award conflicts with positive law, the Court then would face two related questions: what are the limits of the public policy exception, and were such limits transgressed in this case. It is to those questions that we now turn.

Although this Court first recognized the public policy exception in *W.R. Grace*, that case does not define the parameters of that exception, nor has the Court done so in any subsequent case. *W.R. Grace* does state one limiting principle, however: to justify vacating an arbi-

tration award on public policy grounds, the award must give the contract an interpretation that "violates some explicit public policy," one that "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" 461 U.S. at 766.

There is no doubt that it is against the "explicit public policy" of Louisiana for any individual to possess marijuana within the State; La. Rev. Stat. § 966(D) makes possession of marijuana a criminal offense. But that statute also defines the penalties for this offense and that policy is "vindicated . . . by a criminal conviction and the judicial imposition of a penalty," *Electrical Workers Local 453 v. Otis Elevator Co.*, 214 F.2d 25, 29 (2d Cir. 1963) (Marshall, J.). The loss of employment is *not* one of the sanctions provided by Louisiana law for one convicted of possession of marijuana. And not even the courts below suggested that the public policy embodied in the Louisiana criminal law precludes the continued employment of one found possessing marijuana or precludes the enforcement of an arbitration award compelling the reinstatement of such an individual.

The court below instead relied on what it termed the "public policy . . . against the operation of dangerous machinery by persons under the influence of drugs or alcohol." That court did not point to any statutory source for that policy.[17] Nonetheless we may assume,

---

[17] The Fifth Circuit instead relied as its prior decision in *Amalgamated Meat Cutters v. Great Western Food Co.*, *supra* n.15. But that case involved a truck driver who was discharged for drinking, and the Fifth Circuit there relied on the Federal Motor Carrier Safety Regulations which expressly address the use of alcohol by truck drivers. *See* 712 F.2d at 125. Thus, whatever the merits of the decision in *Amalgamated Meat Cutters*, *see* n.15 *supra*, that

at least for present purposes, that preventing those under the influence of drugs or alcohol from operating dangerous machinery is more than a "supposed public interest" and rises to the level of an "explicit public policy" within the meaning of *W.R. Grace*. For, in all events, it is clear that the Arbitrator's award here does not "violate[]" that policy, *W.R. Grace*, 461 U.S. at 766, and hence is entitled to enforcement.

The Court's opinion in *W.R. Grace* illustrates the type and degree of conflict between an arbitral award and "explicit public policy" that is required before a court is justified in setting aside the award as violative of that policy. *W.R. Grace* involved an arbitral decision requiring an employer to compensate employees who the employer had laid off out of seniority order in violation of the seniority provisions of the applicable collective bargaining agreement. The employees had been selected for layoffs pursuant to a judicially-approved conciliation agreement between the employer and the Equal Employment Opportunity Commission which agreement required the employer to maintain the existing proportion of women in the plant during any reduction in force. The employer claimed that the arbitral award should not be enforced in light of the public policy favoring "obedience to judicial orders." 461 U.S. at 766. This Court disagreed and enforced the arbitration award.

In reaching this result the Court recognized that "obedience to judicial orders is an important public policy." *Id.* And, there was undeniably some tension between that policy and the arbitration award at issue in *W.R. Grace*; the award required backpay of the employer to compenstate those disadvantaged by the employer's compliance with the court-approved conciliation agreement. Nonethe-

---

decision provides no support for the public policy invoked by the court below in the instant case.

less the Court concluded that such a tension is *not* sufficient to justify vacating an arbitration award. The Court stressed that the *W. R. Grace* arbitration award did not "require[] that layoffs be conducted according to the collective-bargaining agreement" but "simply held, retrospectively, that the employees were entitled to damages." *Id.* at 768-69. And the Court concluded that

> [e]nforcement of [the arbitration] award will not create intolerable incentives to disobey court orders. Courts have sufficient contempt powers to protect their injunctions, even if the injunctions are issued erroneously. In addition to contempt sanctions, the Company here was faced with possible Title VII liability if it departed from the conciliation agreement in conducting its layoffs. [*Id.* at 769-70]

W.R. Grace thus indicates that a clear and irreconcilable conflict between an arbitral award and explicit public policy must be established before the award can be said to *violate* such a policy.

In this case, no such conflict has been shown to exist between the award and the public policy against the operation of dangerous machinery by persons under the influence of drugs or alcohol. To begin with, the Arbitrator has *not* held that the collective agreement precludes the discharge of an employee who has reported to work while under the influence of drugs or alcohol. Nor has the Arbitrator ordered the reinstatement of an employee who has been proven to have reported to work while under the influnce. The Arbitrator's decision thus does not in any way protect, authorize, condone or sanction reporting to work while under the influence of drugs or alcohol. The award simply requires the Company to meet the normal labor arbitration proof requirement for showing the offence on which the discharge was based.

The Arbitrator's award does, to be sure, require that Cooper be reinstated to "his old job or an equivalent job for which the Grievant is qualified." In order to conclude

that this award violates the "public policy . . . against the operation of dangerous machinery by persons under the influence of drugs," the Fifth Circuit was required to make the following assumptions. First that court necessarily assumed that any "equivalent job" Cooper might be offered would require Cooper to "operate dangerous machinery." Second, the court below must have assumed that the Company would lack the means to monitor or supervise Cooper so as to assure that he did not perform such duties while under the influence of marijuana. Third and finally, that court assumed that after being reinstated, Cooper would report to work "under the influence of drugs."

None of these assumptions is supported by the record in this case. The record is completely silent with respect to the type of "equivalent" jobs that might be offered Cooper, and with respect to the type of supervision, monitoring, or drug-testing to which Cooper might be subject after reinstatement. And the record provides no sound basis for concluding that, if reinstated, Cooper would report to work in an impaired state.

Given the Arbitrator's findings—specifically, that Cooper had *not* been in possession of the lit marijuana cigarette found in another employee's car—the sole reason the Fifth Circuit offered, or could offer, for assuming that Cooper would report to work in an impaired state, was the fact that marijuana gleanings were found in a bag in Cooper's car while the vehicle was on company property. But the presence of the gleanings does not say that Cooper had ever reported to work in an impaired state and there is no proof (or finding) that the gleanings resulted from on-premises or on-the-job use of marijuana.

Thus the Fifth Circuit's refusal to enforce the arbitration award rests either on *speculation* as to Cooper's past conduct, or else on *predictions* of future misconduct going far beyond anything in the record. In either event, this

Court's *W.R. Grace* decision makes it plain that far more must be shown before an arbitration award can be found to violate public policy.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

LYNN AGEE
MARK BROOKS
3340 Perimeter Hill Drive
P.O. Box 1475
Nashville, TN 37202

MICHAEL GOTTESMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

DAVID SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Supreme Court, U.S.
FILED
JUN 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-651

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, et al.

Petitioners

v.

MISCO, INC.

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

A. RICHARD GEAR *
TIMOTHY B. BURNHAM
COOK, YANCEY, KING & GALLOWAY
1700 Commercial National Tower
333 Texas Street
Shreveport, LA 71101-3621
(318) 221-6277

* Counsel of Record

A B Lette
BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did the district court and the Fifth Circuit properly vacate a labor arbitration award on the grounds the award violates public policy?

2. If not, should the arbitration award be vacated on the grounds the award exceeds the arbitrator's power, is irrational, and is imperfectly executed?

INDEX

QUESTIONS PRESENTED.....i
INDEX.....ii
TABLE OF CITATIONS.....iii
STATEMENT.....1
SUMMARY OF ARGUMENT.....7
ARGUMENT.....8
I. The Fifth Circuit Properly Vacated The Arbitrator's Award Based On Public Policy.....8
A. The Public Policy Grounds Relied Upon By The Fifth Circuit Are Well Defined And Dominant And Were Ascertained By Reference To The Laws And Legal Precents.....8
B. The Scope Of The Public Policy Exception Must Be Broad Enough To Encompass The Important Policies Of Public Health And Safety In The Workplace.....19
II. Even If This Court Were To Limit The Public Policy Exception To Cases In Which An Arbitration Award Conflicts With Positive Law, The Arbitrator's Award Should Be Vacated Because It Exceeds The Arbitrator's Power, Is Irrational, Is Imperfectly Executed, And Is A Dispensation Of "His Own Brand Of Industrial Justice".....31
CONCLUSION.....40

TABLE OF CITATIONS

CASES: **PAGE**

Amalgamated Meat Cutters & Butcher Workmen v. Great Western Food Co., 712 F.2d 122 (5th Cir. 1983).....22,23

American Postal Workers Union v. United States Postal Service, 789 F.2d 1 (D.C. Cir. 1986).....25

Becken v. Manpower, Inc. 532 F.2d 56 (7th Cir. 1976).....15

Bevles Co. v. Teamsters Local 986, 791 F.2d 1391 (9th Cir. 1986), *appeal pending*.....25

Borsari v. Federal Aviation Administration, 699 F.2d 106 (2d Cir.), *cert. denied*, 464 U.S. 833 (1983).....23

Colwell v. Oatman, 32 Colo. App. 171, 510 P.2d 464 (Ct. App. 1973).....15

E. I. DuPont de Nemours & Co. v. Grasselli Employees Independent Association, 790 F.2d 611 (7th Cir.), *cert. denied*, ____ U.S. ____, 107 S. Ct. 186 (1986).....24

General Portland, Inc., 62 Lab. Arb. (BNA) 709 (Autrey, Arb. 1974).....36

Grand Rapids Die Casting Corp. v. Local Union No. 159, United Automobile, Aerospace & Agriculture Implement Workers, 684 F.2d 413 (6th Cir. 1982).....38

Gunther v. San Diego & Ariz. E. Ry., 382 U.S. 257 (1965).....31

Hurd v. Hodge, 334 U.S. 24 (1948).....9

Jones v. Thomas, 426 So. 2d 609 (La. 1983).....15

Loveless v. Eastern Air Lines, 681 F.2d 1272 (11th Cir. 1982).....31

McCleod v. City of Detroit, 39 Fair Empl. Prac. Cas. (BNA) 225 (E.D. Mich. 1985).....13

TABLE OF CITATIONS (continued)

CASES: **PAGE**

Misco, Inc. v. United Paperworkers International Union, 768 F.2d 739 (5th Cir. 1985), *cert. granted* 7,22,35,36,39

Muschany v. United States, 324 U.S. 49 (1945) 9

NLRB v. Big Three Welding Equipment Co., 359 F.2d 77 (5th Cir. 1966) 30

Northwest Airlines v. Air Line Pilots Association, International, 808 F.2d 76 (D.C. Cir. 1987), *appeal pending* 26

Safeway Stores v. American Bakery & Confectionery Workers International Union, 390 F.2d 79 (5th Cir. 1968) 38

Schmidt v. Republic Airlines, 630 F. Supp. 1303 (D. Minn. 1986) 24

S. D. Warren Co. v. United Paperworkers' International Union, 815 F.2d 178 (1st Cir. 1987) 20,30,32

State v. Smith, 257 La. 1109, 245 So. 2d 327 (1971) 34

State v. Porter, 296 So. 2d 302 (La. 1974) 35

Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) 25

Swift & Co., 72 Lab. Arb. (BNA) 513 (Rentfro, Arb. 1979) 20

United States Postal Service v. American Postal Workers Union, 736 F.2d 822 (1st Cir. 1984) 23,30

United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960) 21

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 9,21,31,32

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 21

Watauga Industries, 78 Lab. Arb. (BNA) 697 (Galambos, Arb. 1982) 20

TABLE OF CITATIONS (continued)

CASES: **PAGE**

World Airways v. International Brotherhood of Teamsters, 578 F.2d 800 (9th Cir. 1978).....24,25

W. R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757 (1983).....*passim*

STATUTES:

Arbitration Act, 9 U.S.C. § 4.....6,32

Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in 21 U.S.C. §§ 801-966 and 42 U.S.C. §§ 257-261a).....13

Federal Mine Safety and Health Amendment Act of 1977, 30 U.S.C. §§ 801-962.....14

Fed. R. Civ. P. 11.....20

Labor Management Relations Act, 1947, 29 U.S.C. § 185(a).....6

La. R.S. 40:966(C) & (D).....13

Louisiana Worker's Compensation Law, La. R.S. 23:1021-:1379.....15

Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678.....14

Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i.....12

MISCELLANEOUS:

Chiang & Hawks, *Urine Testing for Drugs of Abuse -Implications of Drug Levels in Body Fluids: Basic Concepts*, Res. Monograph Series 73, at 62 (Nat'l Inst. on Drug Abuse 1986).....16

Cone & Johnson, *Contact Highs and Urinary Cannabinoid Excretion After Passive Exposure to Marijuana Smoke*, 40 Clinical Pharmacology & Therapeutics 247 (Sept. 1986).....17

TABLE OF CITATIONS (continued)

PAGE

MISCELLANEOUS:

T. Denenberg & R. Denegerg, *Alcohol and Drugs: Issues in the Workplace* (BNA 1983).....13

Dufek & Underhill, *Arbitration Can Thwart Employer No-Drug Policy*, Legal Times, Mar. 18, 1985, at 21.....20

Minutes of the Proceedings of the Louisiana Senate Committee on Labor and Industrial Relations, Senate Bill 180 (May 13, 1987).....14

Speech by President Ronald Reagan on Drug Abuse --National Campaign, 22 Weekly Comp. of Pres. Doc. 1040 (Aug. 11, 1986).....11

Taking Drugs on the Job, Newsweek, Aug. 22, 1983, at 52.....10

Nov. 1986 *U.S. Code Cong. & Admin. News* No. 9, at B50.....12

J. Walsh & S. Yohay, *Drug and Alcohol Abuse in the Workplace: A Guide to the Issues* (1987).....17

Yesavage, Leirer, Denari & Hollister, *Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, 142 Am. J. Psychiatry 1325 (Nov. 1985).....18

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

NO. 86-651

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, et al.

Petitioners

v.

MISCO, INC.

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT

Misco, Inc., the Company (respondent) and the unions (petitioners) were, at all times material herein, parties to a collective bargaining agreement covering the production and maintenance employees at respondent's paper-converting plant located in Monroe, Louisiana. The collective bargaining agreement contains procedures for filing a grievance and for pursuing arbitration. The powers of the arbitrator are limited by paragraph 3 of Article VI of the collective bargaining agreement as follows:

> a. He shall have no power to add to, subtract from or modify any of the terms of this Agreement or any supplementary agreement nor to rule on any matter except while this Agreement is in full force and effect between

the parties.

b. He shall have no power to substitute his discretion for the employer's discretion in cases where the employer is given discretion by this Agreement.

Joint Appendix at 19 (hereinafter cited as Jt. App.).

A management rights clause gave respondent full authority to manage its business including the right

> to reprimand, discharge or otherwise discipline employees; . . . to unilaterally establish, modify, and enforce the plant rules or regulations and/or disciplinary procedures, policies and practices; . . . the Company's failure to exercise any function or right in any particular way shall not be deemed a waiver of its rights to exercise such function or right . . . .

Jt. App. at 13-14 (Article IV(1)). Further, Article XI provided that the respondent "shall retain the right to establish, maintain, enforce, rescind, amend or change rules and regulations regulating the discipline or discharge of employees and the procedures for issuance of reprimands and other forms of discipline." *Id.* at 20-21.

In its business, respondent takes rolls of paper and finishes the paper into different forms for the packaging industry. The record developed before the arbitrator established that the industry is a hazardous one, that the equipment and machinery used in the industry are hazaradous, and that the slitter rewinder which the grievant operated was considered particularly hazardous because of the sharp edges used to cut the paper into desired widths. For the four years prior to the arbitration hearing, ten to fifteen accidents had occurred on the slitter

rewinder which demonstrates the hazardous nature of that equipment. Appendix D of Petitioner's Petition for Writ of Certiorari at 31a-32a (hereinafter cited as App. D of Pet.).

Respondent's position has been and is that the use of drugs or alcohol impairs the judgment and coordination of operators of hazardous equipment and presents a danger to the operator and to other employees. Possession of drugs or alcohol at the workplace poses a significant risk that they will be used by employees while in the workplace. The impairment caused by use of drugs or alcohol is substantiated in the scientific community, judicial precedent, statutory law, and common sense.

In an effort to educate the employees in furtherance of its concerns for their safety, respondent took a strong position against the use or possession of drugs or alcohol in the workplace through the publication of bulletins, through employee meetings, and through the reaffirmation of its rules concerning such which had been in effect for almost a decade. App. D of Pet. at 32a. The rule involved in this matter was contained in the Company Rules under the heading *Causes for Discharge.* Rule II(1) provided that the following types of conduct were causes for discharge:

> 1. Bringing intoxicants, narcotics, or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics, or controlled substances.

Id. at 31a.

Prior to grievant's arrest at the plant on January 21, 1983, for possession of marijuana at his home, respondent had found disturbing evidence of violations of its no-drug

rule at its plant. Partially smoked marijuana cigarettes or "roaches" were found, along with empty beer cans and whiskey bottles. Additionally, respondent's foremen had reported they smelled at different times the odor of marijuana smoke at the plant, but that they were unable to locate the rule violators. *Id.* at 33a. Respondent's production manager even began living in a trailer located on the premises to try to apprehend the rule violators by surprise visits, but he was unsuccessful. Six months before the grievant's arrest, respondent's concern over drug use at its plant grew to the point that it held a special meeting of employees to warn them against possession or consumption of drugs or alcohol in the plant as prohibited by rule II(1). *Id.* at 33a-34a.

The drug problems appeared to be on the second shift, or night shift, which was the grievant's shift. This shift had significant problems with production and quality that were not encountered on the day shift. Most of the problems were caused by lack of accuracy and judgment typical of a drug- or alcohol-impaired employee. *Id.* at 33a. The grievant on occasions suffered from these typical problems of impairment. On August 5, 1982, he was formally reprimanded in writing and his pay was cut as a disciplinary measure for his failure to read and fix production orders correctly and for his failure to meet the company's production standards. Jt. App. at 33. He received a second formal written reprimand on January 20, 1983, the day before his arrest in the parking lot at the plant. His second reprimand put him on a ninety-day probationary period for running not one, but five rolls of material of the wrong width, another error of accuracy and judgment typical of an impaired employee. The reprimand stated that "[d]uring this time your work performance, attitude, and productivity will be monitored very closely. Your continued employment with this company is in your hand, as one more mistake such as this will result in your being

removed from this machine permanently." *Id.* at 33-34

On January 21, 1983, while grievant was at work, oficers of the Ouachita Parish Metro Narcotics Unit, pursuant to a search warrant, searched grievant's house and fouund two and one-half bags of marijuana, five marijuana cigarettes, weight scales, and marijuana cigarette paper. App. D. of Pet. at 34a. While the house was being searched, another officer engaged in surveillance of respondent's lot to detain grievant if he tried to get away. The officer observed grievant and two other employees walking in the plant parking lot where they entered grievant's car. After a few minutes, they exited grievant's car and walked over and got in a two-door white Oldsmobile Cutlass located two car-lengths from grievant's car. Grievant sat in the back seat of the white Cutlass and the other two employees sat in the front seat. When the other police officers drove onto the parking lot sometime later, the two men in the front seat of the car hurried inside the plant, but grievant remained outside the car. One officer found a lit marijuana cigarette in the right door ash tray of the white Cutlass and two of the officers smelled the aroma of marijuana smoke emanating from the white Cutlass. The police officers arrested grievant.

After his arrest at the parking lot, the grievant signed a form permitting the search of his car. Jt. App. at 37. A police officer searched his car and found a plastic scale case with gleanings which later proved to be marijuana. The scale case was obviously the case for the weight scale the police found at grievant's home. The police officer told no representative of respondent about the quantity of marijuana found in grievant's car. This was not discovered by respondent until about a week before the arbitration hearing when during a meeting with the police, undersigned counsel learned of this evidence. App. D. of Pet. at 37a. The lit marijuana cigarette found in the car on the parking lot

of respondent's plant and the marijuana gleanings in the scale case found in grievant's vehicle while at the plant were analyzed and determined to be marijuana. Jt. App. at 36; App. D. of Pet. at 37a.

Because grievant told respondent that the basis for his arrest was possession of marijuana *at his home*, and not possession or use *at the plant*, no detailed investigation of the arrest in the parking lot took place until a police officer informed respondent's president six days after the arrest that the police considered the plant to have a drug problem, that a lit marijuana cigarette had been found in a car on the company's premises, and that they had targeted grievant. App. D. of Pet. at 38a. Management investigated the incident, had three interviews with grievant and other employees, met with all the employees about the drug problem in the plant, and contacted the local union to discuss the situation. On February 4, 1983, management reviewed all the facts of the investigation, including the grievant's prior work record, and decided to terminate grievant which they did on February 7, 1983. *Id.* at 38a-40a. On April 12, 1983, grievant pled guilty to possession of the marijuana found in his home and was sentenced to a fine of $450.00 and costs. *Id.* at 40a.

The grievance was filed on February 7, 1983, *id.*; meetings were held at the interim stages of the grievance procedure, and on September 26, 1983, the arbitrator held the hearing. *Id.* at 25a. On October 31, 1983, the arbitrator sustained the grievance and ordered the company to restore the grievant to "his old job or an equivalent job for which the Grievant is qualified." *Id.* at 53a. On November 21, 1983, respondent filed a petition to set aside the arbitration award under section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185(a), and under the Arbitration Act, 9 U.S.C. § 4, on the grounds the award was against public policy, in excess of the arbitrator's powers,

irrational and such an imperfect execution of his powers that a mutual, final and definite award could not be made. Jt. App. at 4-6. Motions for summary judgment were filed by both parties and on October 3, 1984, the district court vacated the arbitrator's award on the basis that "an award that is contrary to law or public policy need not be enforced, " App. C of Pet. at 20a, and that the award reinstating the grievant offended the public policy against marijuana possession and the public policy against the operation of dangerous machines by workers impaired by drugs. *Id.* at 22a.

Petitioners appealed the decision to the United States Court of Appeals for the Fifth Circuit and a majority of the judges on the panel agreed with the district court that reinstating the grievant contravened the public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." *Misco, Inc. v. United Paperworkers International Union*, 768 F.2d 739, 743 (5th Cir. 1985), *cert. granted;* App. A of Pet. at 1a, 7a. A writ of certiorari to review the Fifth Circuit's decision was granted by this Court on January 12, 1987.

SUMMARY OF ARGUMENT

The arbitrator in this case reinstated a drug user to operating hazardous machinery in the paper industry. The district court and the Fifth Circuit found that this award violated the public policy against marijuana possession and against operation of dangerous machines by workers under the influence of drugs. The courts below properly exercised the "public policy exception" articulated by this Court in *W. R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers,* 461 U.S. 757 (1983). The public policy grounds relied upon by the courts below are well defined and dominant and are found in the laws of this nation and

the State of Louisiana which prohibit the use or possession of illegal drugs, such as marijuana, and which emphasize public health and safety in the workplace, and are supported by a large amount of scientific evidence that marijuana usage impairs judgment and coordination and is a danger in the workplace of a hazardous industry.

The public policy exception recognized in *W. R. Grace* should be exercised by the courts particularly in the fields of public health and safety as the courts of appeals have so done. Respondent submits that the national labor policy is undermined by the isuance of irrational awards which fly in the face of public policy and common sense, and that national labor policy will benefit ultimately by judicial rejection of arbitrator's awards which offend public policy in the areas of public health and safety.

In addition to the public policy exception, the arbitrator's award should be vacated on the grounds urged by respondent below, that the arbitrator's award dispenses "his own brand of industrial justice," exceeds his power, is irrational and is so imperfectly executed that no court should enforce it.

ARGUMENT

I

THE FIFTH CIRCUIT PROPERLY VACATED THE ARBITRATOR'S AWARD BASED ON PUBLIC POLICY

A. THE PUBLIC POLICY GROUNDS RELIED UPON BY THE FIFTH CIRCUIT ARE WELL DEFINED AND DOMINANT AND WERE ASCERTAINED BY REFERENCE TO THE LAWS AND LEGAL PRECEDENTS

In *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), this Court, although limiting the judicial review of labor arbitration awards, noted that:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Then in 1983 in *W. R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757 (1983), this Court developed an exception to enforcement of arbitral awards.

> If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. *Hurd v. Hodge*, 334 US, at 35. . . . Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."

W. R. Grace, 461 U.S. at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

Respondent submits the United States Court of Appeals for the Fifth Circuit properly exercised the public policy exception set forth in *W. R. Grace* by relying upon well-defined policies against the use or possession of illegal drugs and of public health and safety. The dangers to

health and safety faced by the citizens of this nation and by employees of American industry because of the use of illegal drugs are well defined and dominant. We live in an age when a promising young sports figure such as basketball player Len Bias died from a cocaine overdose, and New York Mets star pitcher Dwight Goodin underwent drug treatment to cure his cocaine habit after his performance fell dramatically from that of the previous season. Entertainers Stacy Keach and David Crosby, to mention only two, are jailed for possession of illegal drugs. The ranks of Alcoholics Anonymous and Narcotics Anonymous grow daily. The number of drug and alcohol treatment centers has mushroomed to handle the growing number of Americans trying to keep their lives from being destroyed.

Numerous studies have been made of the cost and effects of the proliferation of drug use in the American workplace.

> The cost to the American economy is enormous: nearly $26 billion--including $16.6 billion in lost productivity alone--according to one authoritative study. . . . But others put the figure much higher. Employees who use drugs on the job are one-third less productive than straight workers, three times as likely to be injured and absent far more often. The indirect cost to the economy is impossible to measure.

Taking Drugs on the Job, Newsweek, Aug. 22, 1983, at 52.

The executive branch of our government has clearly enunciated a public policy against the use of drugs in the American workplace. In a speech on August 4, 1986, President Ronald Ragan called for the American people to join him in a national crusade against drugs listing six goals in a national strategy to eradicate drug abuse. The goals were

a drug-free workplace using mandatory drug testing "where the employees have the health of others and the safety of others in their hands," Speech by President Ronald Reagan on Drug Abuse--National Campaign, 22 Weekly Comp. of Pres. Doc. 1040, 1042 (Aug. 11, 1986); drug-free schools; better drug treatment facilities; more international cooperation in the war on drugs; prompt and severe punishment for all drug dealers; and expanded public awareness about the dangers of drugs. *Id.* at 1041-42.

Further, on September 15, 1986, President Reagan signed Executive Order 12,564 requiring federal employees to refrain from the use of illegal drugs and asserting that persons who use illegal drugs are not suitable for federal employment. The Order called for establishment of drug testing of sensitive-position employees, and of other employees when there is a reasonable suspicion that the employee uses illegal drugs, in examinations following accidents or unsafe practices and in certain other circumstances. The Executive Order makes the following policy declarations, *inter alia:*

> Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year . . . .
>
> . . . .
>
> The use of illegal drugs, *on or off duty,* by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, *on or off duty,* by Federal employees also can pose a serious health and safety threat

> to members of the public and to other Federal employees . . . .

Nov. 1986 *U.S. Code Cong. & Admin. News* No. 9, at B50-51 (emphasis added).

The legislative branch of our federal government also has legislated against drug use in the workplace. Congress passed the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i, which forbids discrimination against the handicapped by employers who have contracts valued in excess of $2,500.00 with the federal government by requiring in section 793 that federal contractors take affirmative action to employ and advance qualified individuals with handicaps as defined in subsections 706(8)(A) and (B). Subsection 706(8)(B) states that the term "individuals with handicaps"

> does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Thus, Congress has mandated that current drug users are not required to be hired or advanced in employment by federal contractors. Such individuals have no protection under the Rehabilitation Act of 1973.

Notably, in one recent case under the Rehabilitation Act involving the City of Detroit's refusal to hire marijuana users as firefighters, the district judge found that "within minutes of ingestion marihuana can cause physical reactions such as short-term memory loss, problems with coordination and thinking, and diminishment of the ability to take risks. This evidence proved that the use of

marihuana by a firefighter constituted a direct threat to the property and safety of the community." *McCleod v. City of Detroit*, 39 Fair Empl. Prac. Cas. (BNA) 225, 226 (E.D. Mich. 1985).

Federal criminal policy also prohibits the possession and use of controlled substances. The Controlled Substances Act was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in 21 U.S.C. §§ 801-966 and 42 U.S.C. §§ 257-261a), which was designed to strengthen law enforcement in the abuse of illegal drugs. Congress stated federal policy to be the following:

> The illegal importation, manufacture, distribution and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

21 U.S.C. § 801(2).

Not only is the possession or use of controlled substances, such as marijuana, a violation of federal law, it is a violation of state laws all over America.[1] In Louisiana particularly, public policy is expressed in the criminal laws of the State of Louisiana which provide that possession of marijuana is a crime, and is a crime which is punishable by fine and imprisonment ranging from six months for a first offense to twenty years on a third conviction. La. R.S. 40:966(C) & (D); Jt. App. 38-39. Additionally, in the 1987

---

1. "Although during the 1970s 11 states decriminalized marijuana possession for personal use by substituting small fines for jail terms, the trend may have reached its peak. A report by the National Academy of Sciences in 1982 found that the drug posed physical and emotional dangers sufficient to cause 'serious national concern.' " T. Denenberg & R. Denenberg, *Alcohol and Drugs: Issues in the Workplace* 21 (BNA 1983).

legislative session, the Louisiana Senate Committee on Labor and Industrial Relations passed for consideration by the Louisiana Senate a bill which disqualifies a person from receiving unemployment compensation benefits who is discharged for use of alcohol or illegal drugs. Minutes of the Proceedings of the Louisiana Senate Committee on Labor and Industrial Relations, Senate Bill 180 (May 13, 1987).

A further emphatic statement of national safety policy is found in the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-678. Section 654 provides as follows:

> (a) Each employer--
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
>
> (2) shall comply with occupational safety and health standards promulgated under this chapter.
>
> (b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.[2]

---

2. An additional expression of federal safety policy is found in the Federal Mine Safety and Health Amendment Act of 1977, 30 U.S.C. §§ 801-962. At subsection 801(a) thereof Congress declares that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner." Thus, public health and safety policy is again paramount.

While it seems clear that reinstating a rule-violating user and possessor of drugs to operating hazardous equipment contravenes the duty of an employer to provide a safe workplace, one only needs to look to the *common sense* of the situation to find another source of public policy supportive of the Fifth Circuit's decision. Respondent submits that petitioners' concern with the sanctity of national labor policy as it tends to hold arbitrators' decisions basically inviolate overlooks the common sense absurdity of a result which reinstates a scofflaw drug user to operating hazardous equipment in the already risky paper industry.

In addition to the OSHA statute requiring the employer to provide a safe workplace, the Louisiana Worker's Compensation Law requires the employer to pay compensation to employees for "personal injury by accident arising out of and in the course of [their] employment." La. R.S. 23:1031. Also, under the traditional tort theory of *respondeat superior,* the employer would be liable to third parties for injuries inflicted by its impaired employee. Moreover, drug-impaired employees who commit intentional torts within the course and scope of their employment may subject employers to tort liability. *See Jones v. Thomas,* 426 So. 2d 609 (La. 1983) (cause of action sustained against an employer for the intentional acts of an employee). An employer also may be liable for negligence in its *retention* of employees who are drug users. *See, e.g., Becken v. Manpower, Inc.,* 532 F.2d 56 (7th Cir. 1976) (theory of negligent hiring as a cause of action was accepted); *Colwell v. Oatman,* 32 Colo. App. 171, 510 P.2d 464 (Ct. App. 1973) ($75,000 judgment against employer who negligently hired drunken employee who injured another employee). Clearly, the public policy grounds for not reinstating a drug user is well-established in the worker's compensation laws of Louisiana and the various states and in the civil liability of an employer for the negligent or intentional acts of drug-impaired employees.

The conclusion of the district court and the Fifth Circuit that the intoxicating effects of marijuana impair an employee's ability to safely operate dangerous machinery has been well-established by the scientific community. Based upon their clinical research, C. Nora Chiang, Ph.D. and Richard L. Haeks, Ph.D. reported the following:

> Marijuana use has been associated with decrements in behavior and cognitive performance. The incidence of detectable levels of THC [the psychoactive component in marijuana] in fatally injured drivers ranges from 3.7 percent to 37 percent . . . . While a direct causal effect of marijuana is difficult to establish from such studies because of the generally high incidence of alcohol in the subjects as well as lack of control groups, the indication is clear that a performance-impairing drug (THC) is present and is therefore likely to contribute to the factors leading to the accident.
>
> In laboratory investigations, it has been reported that THC may affect complex performance skills up to 24 hours after drug infestion. One study reports a "hangover" effect on the morning following a dose of marijuana (9 hours after smoking a marijuana cigarette of 3 percent THC) . . . . The mean performance of pilots in a flight simulator showed a trend toward impairment at 24 hours after smoking a cigarette of 2 percent THC . . . . These results have implications for THC effects on the performance of complex tasks the day after smoking when blood concentrations are very low.

Chiang & Hawks, *Urine Testing for Drugs of Abuse-Implications of Drug Levels in Body Fluids: Basic Concepts*, Res. Monograph Series 73, at 62, 64-66 (Nat'l Inst. on Drug Abuse 1986) (citations omitted).

J. Michael Walsh, Ph.D. and Stephen C. Yohay, explain the psychological effects of marijuana.

> The length of time that a drug will affect human performance depends to a great extent on the complexity of the task being performed. For example, marijuana has been shown to disrupt simple tasks (e.g., reaction time) for a relatively short period, i.e., 2 to 4 hours. However, for more complex cognitive tasks such as those requiring divided attention, information processing, and perceptual skills, the marijuana effects persist for at least 8 to 10 hours after the drug is smoked. A recent study involving pilots using flight simulators showed that marijuana produced significant impairment in flying skills even 24 hours after the drug was administered.

J. Walsh & Yohay, *Drug and Alcohol Abuse in the Workplace: A Guide to the Issues* 21-22 (1987))footnotes and emphasis omitted). Two researchers demonstrated that passive inhalation can produce subjective effects. Cone & Johnson, *Contact Highs and Urinary Cannabinoid Excretion After Passive Exposure to Marijuana Smoke*, 40 Clinical Pharmacology & Therapeutics 247, 253 (Sept. 1986).

Finally, Jerome A. Yesavage, M.D., writes:

> There is . . . extensive literature on THC use and human performance under the influence of THC. Several studies have shown effects on memory, attention, and perception; however, these effects were only rarely significant 4 hours after smoking. Kielholz et al. found general impairment in driving performance to last as long as 6 hours after the intake of THC. One study by the FAA found impaired performance on a number of

> cognitive tasks some 14 hours after enough alcohol had been ingested to produce a blood level of 0.1 mg/dl. The current data, from an even more complicated task, indicate impaired performance 24 hours after smoking THC. Thus, it appears that our ability to identify drug effects may depend on the complexity of the task needed.
>
> These results suggest a need for concern about the performance of those entrusted with complex behavioral and cognitive tasks within 24 hours after smoking marijuana. The subjects in this experiment were unaware of any effects on their performance, mood, alertness, etc. Some results may be applicable to other tasks, such as operating complicated heavy equipment or railway trains and switching procedures.

Yesavage, Leirer, Denari & Hollister, *Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, 142 Am. J. Psychiatry 1325, 1328 (Nov. 1985).

Thus, the scientific evidence is substantial and in agreement that marijuana usage causes significant impairment to the user for several hours after ingestion. An arbitral award reinstating a drug user to operating dangerous machinery ignores the scientific evidence of impairment and subjects the drug user, his fellow employees, and others to the dangers created by such impairment. The district court and the Fifth Circuit correctly relied upon the strong public policies against the use or possession of illegal drugs and of public health and safety and the obvious impairment associated with marijuana usage to support their determination that there is a public policy against the operation of dangerous machinery by persons under the influence of drugs or alcohol which warranted setting aside the award of the arbitrator.

B. THE SCOPE OF THE PUBLIC POLICY EXCEPTION MUST BE BROAD ENOUGH TO ENCOMPASS THE IMPORTANT POLICIES OF PUBLIC HEALTH AND SAFETY IN THE WORKPLACE

A balance must be drawn between the relatively unfettered power of labor arbitrators under the doctrine of *Enterprise Wheel, supra,* and the need for the federal judiciary to intervene in the face of absurd arbitration decisions which violate public policy. The policy exception articulated by this Court in *W. R. Grace, supra,* is the obvious vehicle for the judiciary to set aside arbitral awards which offend common sense and are a threat to public health and safety in the workplace.[3] Permitting absurd arbitral awards to stand where they conflict with national health and safety policy creates a disrespect and distrust for labor arbitration which will ultimately serve to undermine the institution of labor arbitration and national labor policy insofar as it promotes labor arbitration as a means of avoidance of disruptions of interstate commerce. The petitioners and the National Academy of Arbitrators as *amicus curiae* noted a perceived increasing trend to seek judicial relief from arbitral awards. They asert the danger is that judicial decisions setting aside arbitrators' awards will invite further litigation by others in the hope of success in vacating the order or in delaying its execution. Any increase in the number of petitions seeking judicial review of labor arbitrators' decisions may be the result of an increasing number of decisions which are not up to standard or in which the result is irrational or offensive to public policy and

---

[3] Respondent does not seek in this case to determine the outer limits of the public policy exception. Respondent does seek to have this Court rule that the public policy exception should encompass, at the least, the public health and safety policies involved in arbitral awards which reinstate drug users to operating hazardous equipment.

the common sense of the parties.[4] A sufficient deterrent to frivolous attempts to vacate arbitration awards is the sanction of attorney fees under Rule 11 of the Federal Rules of Civil Procedure, which sanction petitioners sought, but which was denied.

In *S. D. Warren Co. v. United Paperworkers' International Union*, 815 F.2d 178 (1st Cir. 1987), the First Circuit set aside such a patently offensive decision. *S. D. Warren* involved facts very similar to the instant case. The employer also operated a paper mill and the union was the same international union. A police drug unit of the State of Maine investigated the drug problem at the employer's plant and as a result, twelve employees who were shown to have possessed or sold drugs in violation of the plant no-drug rule were discharged by the employer. The arbitrator found extenuating circumstances, decided that the discharge penalty was too great, and reduced the penalty

---

[4] The observations of Robert A. Dufek and D. Michael Underhill reflect the sentiment of many employers.

> Despite the lip service paid to the "seriousness" of the offense, *Swift & Co.* [72 Lab. Arb. (BNA) 513 (Rentfro, Arb. 1979)] illustrates an attitude that pervades many arbitration decisions--that "soft" drug use in the workplace (particularly involving marijuana) is not a sufficiently serious problem to warrant discharge, although lesser penalties may be appropriate. [Citing *Watauga Industries*, 78 Lab. Arb. (BNA) 697 (Galambos, Arb. 1982).] Many arbitrators refuse to sustain a discharge notwithstanding the fact that the violation is clear and the rules unequivocal.
>
> The arbitrators often find some alleged "due process" problem with the discharge in terms of notice, investigatory interviews, or severity of the discipline. Fundamentally, however, the problem is often an unwillingness to impose a discharge--as opposed to a lesser penalty--for "soft" drug use, particularly when drug use has become so prevalent in society at large.

Dufek & Underhill, *Arbitration Can Thwart Employer No-Drug Policy*, Legal Times, Mar. 18, 1985, at 21.

to suspension. The arbitrator concluded that because the plant rule did not require mandatory discharge for violation of its drug rule, she had some latitude and could substitute a punishment less than discharge. The First Circuit was mindful of the teachings of the Steelworkers' Trilogy,[5] but stated that "the courts have not been willing to sacrifice logic, reason, and sound principles of contract law on the altar of the practicality of giving unlimited power to arbitrators and absolute deference to their interpretations of collective bargaining agreements." *Id.* at 182. The court found that the arbitrator imposed a punishment which the parties had not bargained for and that the award did not draw its essence from the collective bargaining agreement.

The court further considered the issue of public policy, noting that, as here, this was a paper mill where the employees handled bulky materials and drove heavy machinery and trucks. The arbitrator concluded that "drug-dealing constitute[s] a danger to all employees' safety." *Id.* at 186. The court concluded:

> In view of the evidence and the conclusion of the arbitrator, we conclude that the use and sale of drugs in this shop is dangerous and constitutes a threat to the safety of all the employees. It also constitutes a violation of the state and federal law.
>
> . . . .
>
> . . . Furthermore, the nation has focused on the corrosive consequences of drug sale and use and has devoted itself to their eradication. In

---

[5] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

> particular, the work shop is a place where such usage is abominable not only because of the health hazard it creates, but also because it creates an unsafe atmosphere and is deteriorative of production, the quality of the products, and competition.
>
> We conclude that there is a well-defined public policy against the use of drugs in the workplace.

Id.

The unions argued to the First Circuit, as they argue to this Court, that in order to apply public policy a statute must exist providing that possession or distribution of marijuana *in the workplace of a paper mill* is a crime punishable by a jail sentence. This argument was rejected. The court stated that "[t]he use of drugs in the case before the court created a dangerous situation that imperiled the safety of fellow employees. A hostile atmosphere developed where innocent workers were grouped together with 'junkies.' . . . This arbitration award cannot be enforced as a matter of public policy." *Id.* at 187 (citing the Fifth Circuit's decision in *Misco*). Thus, the First Circuit, like the Fifth Circuit in *Misco* and in *Amalgamated Meat Cutters & Butcher Workmen v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983), quite reasonably applied the well-expressed and obvious public health and safety policies involved in not requiring employers to retain employees who violate rules against drug use or possession. These results are dictated by public policy and common sense.

Another utilization of public policy to set aside an arbitral award is found in the First Circuit's earlier decision in *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984). There, a postal office window clerk who was having financial difficulties embezzled $4,325.00, allegedly with an intent to repay the funds later. Incredibly, the arbitrator ruled that the dishonest act did not constitute just cause. The First Circuit vacated that award as against a public policy found not only in positive law, but also in "the clear dictates of common sense." *Id.* at 825. The court noted the adverse effects on other employees of reinstating a dishonest employee and the diminishing of public trust in the postal service and the federal government by condoning dishonesty. *Id.* The First Circuit commented in *S. D. Warren* that drug use in the workplace involved a more life-threatening situation than the postal service case. Respondent submits that when public policies are compared, the policy of public health and safety is, indeed, the more substantial policy.

The public policy against the possession or use of illegal drugs is well-established. The policy of preventing employees who are impaired by drugs or alcohol from operating dangerous machinery and endangering themselves and fellow employees is also well-established. *Amalgamated Meat Cutters & Butcher Workmen v. Great Western Food Co.*, 712 F.2d 122, 125 (5th Cir. 1983) ("[T]he public policy of preventing people from drinking and driving is embodied in the case law, the applicable regulations, statutory law, and pure common sense."); *Borsari v. Federal Aviation Administration*, 699 F.2d 106 (2d Cir.),

cert denied, 464 U.S. 833 (1983) (dismissal of air traffic controller based upon sale and possession of illegal drugs upheld as promoting the efficiency of the service); *Schmidt v. Republic Airlines*, 630 F. Supp. 1303, 1305 (D. Minn. 1986) ("The strong federal policy against the use, sale, and transporting of cocaine is too well known to require discussion here."); *World Airways v. International Brotherhood of Teamsters*, 578 F.2d 800 (9th Cir. 1978) (in a case predating *W. R. Grace*, the court found a strong federal policy existed in assuring the safety of air travel and held an arbitrator exceeded his authority when he reinstated a pilot who had a history of judgmental errors and deficiencies causing threats to safety).

In *E. I. DuPont de Nemours & Co. v. Grasselli Employees Independent Association*, 790 F.2d 611 (7th Cir.), *cert. denied*, ____ U.S. ____, 107 S. Ct. 186 (1986), the Seventh Circuit considered the employer's public policy arguments that the arbitrator failed to give sufficient consideration for safety in the workplace in reinstating an employee who had a mental breakdown, flew into a rage, struck a chemical operator, and attempted to create a chemical reaction that could cause damage to property and person. Unlike the arbitrator here, the *E. I. DuPont* arbitrator *considered* the possibility of future danger to company employees and property, but concluded based upon substantial evidence that the dangers were not likely because of the remoteness of a future breakdown. The court rejected the union's argument, which is also made in the instant case, that an arbitration award cannot be overturned on public policy grounds unless the contract as constructed by the arbitrator violates some rule of positive law. "[T]he Courts have never construed the public policy exception so narrowly." *Id.* at 616. The distinction in *E. I. DuPont* is the arbitrator made a factual finding which was supportable by the evidence that *workplace safety* would *not* be harmed by reinstatement. Undoubtedly, the Seventh Circuit was

willing to apply the public policy exception to a public safety situation in the workplace had it been appropriate to do so. "Of course we should overturn an arbitration award if it violates public policy." *Id.* at 615. There the arbitrator did his job in weighing the pros and cons of reinstatement versus possible threats to safety of other employees and of company property, and ordering reinstatement. In the instant case, the arbitrator *ignored* the respondent's argument that reinstatement was inappropriate on public policy grounds. When an arbitrator *ignores* public policy issues, the courts must act. The arbitrator's decision in *E. I. DuPont* does not offend common sense as did the arbitrator's decision here and in *S. D. Warren.* Respondent submits that the courts must retain the power to vacate awards producing absurd results which fly in the face of public health and safety policy.

Although the First, Fifth, and Seventh Circuits appear in agreement in applying the public policy exception,[6] one circuit court of appeals holds that the public policy exception is *extremely narrow.* In *American Postal Workers Union v. United States Postal Service,* 789 F.2d 1 (D.C. Cir. 1986), the District of Columbia Circuit, unlike the First Circuit, refused to utilize the public policy exception to vacate an arbitrator's award reinstating a discharged postal

---

[6] In *Bevles Co. v. Teamsters Local 986,* 791 F.2d 1391 (9th Cir. 1986), *appeal pending,* the Ninth Circuit refused to vacate an arbitrator's award which reinstated two employees who were not legally entitled to work in this country. The court found that the decision of this Court reversing a NLRB backpay and reinstatement award to illegal aliens in *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984), did not establish a public policy cognizable under the *W. R. Grace* public policy exception. *Bevles,* 791 F.2d at 1393. However, *Bevles* does not seem to limit the Ninth Circuit's willingness to vacate arbitral awards on the basis of a conflict with public health and safety policy, as it demonstrated in *World Airways v. International Brotherhood of Teamsters,* 578 F.2d 800 (9th Cir. 1978) (court vacated an arbitrator's award reinstating a pilot who had a history of judgmental errors and deficiencies causing threats to safety).

employee. The court held that "[t]he arbitrator's award was not itself unlawful, for there is *no legal proscription* against the reinstatement of a person such as the grievant. And the award did not otherwise have the effect of mandating any illegal conduct." *Id.* at 8 (emphasis added). The District of Columbia Circuit also felt that the First Circuit in the *United States Postal Service* case, in which the court vacated an arbitrator's reinstatement of a convicted felon, did not follow the Supreme Court's decision in *W. R. Grace*. *Id.* at 9. Thus, the District of Columbia Circuit has rejected the interpretation of *W. R. Grace*[7] that respondent submits, and the First, Fifth, and Seventh Circuits have adopted, should be followed in cases involving the public health and safety.

The petitioners contend that the existence of a *specific legal proscription* making reinstatement of a particular class of employees illegal is the sole basis upon which the public policy exception of *W. R. Grace* should be exercised. The petitioners argue here, as they argued to the First Circuit in *S. D. Warren*, that unless a law exists prohibiting the employment of drug users in paper mills, no source of public policy exists and the public policy exception of *W. R. Grace* should not be applied. This interpretation is so narrow that it cannot be what was intended by this Court in *W. R. Grace*. If this Court had intended to limit the *W. R. Grace* exception to situations where an award violates a positive law, this Court would have said so. *W. R. Grace's* language permits reliance upon principles that are "well defined and dominant" and which can be

---

[7] In *Northwest Airlines v. Air Line Pilots Association, International*, 808 F.2d 76 (D. C. Cir. 1987), *appeal pending*, the District of Columbia Circuit adhered to its narrow interpretation of the *W. R. Grace* exception and, in affirming an arbitration award reinstating a pilot who was discharged for flying a passenger jet while intoxicated, held that a court must enforce an arbitration award unless the award "contravene[s] established law" or "require[s] an unlawful act." *Id.* at 84.

ascertained by reference to the "laws and legal precedents." This language permits broader sources of public policy than violations of positive law. The petitioners' narrow view of the public policy exception would completely gut *W. R. Grace* of any meaning whatsoever. It is unlikely that any legislature will pass a law prohibiting the employment of specific classes of individuals such as drug users in specific industries. Consequently, if petitioners' argument is adopted, *W. R. Grace's* public policy exception becomes only pretty prose.

Petitioners' concern that the public policy exception adopted by the Fifth Circuit would leave too much room for second-guessing of arbitration decisions, Brief for the Petitioners at 22, fails to recognize that much room already exists based upon the well-known grounds of vacating arbitrators' decisions which exceed their powers and are unfaithful to the language of the collective bargaining agreement. Respondent submits that recognition by this Court that public health and safety are paramount public policies in no-drug rule discharge cases will not create a flood of judicial second-guessing of arbitrators' awards. Petitioners' position also does not truly acknowledge the strength and the dominance of sources of public policy concerning public health and safety such as those discussed at the beginning of this brief. To impress their narrow view of the *W. R. Grace* exception upon this Court, petitioners, as did the arbitrator, are staring at the tree and not seeing the forest of reality of the health and safety hazards in America's drug-filled workplaces and are addressing the question in terms of abstract theories of alleged expertise of labor arbitrators and the sanctity of the labor arbitration process despite the existence of absurd arbitral results which fly in the face of common sense and clear public policy.

The voice of reason must be kept a part of the labor

arbitration process lest employers, who are required to stomach irrational or absurd arbitration decisions which violate clear public health and safety policies, be tempted to reexamine the desirability of arbitration itself as a means of resolving disputes between them and labor. Additionally, employers may attempt to seek relief from irrational arbitral awards by exempting no-drug rule violations or other safety matters from the coverage of the grievance-arbitration machinery. The unions will no doubt strongly resist such exemptions resulting in disruptions of interstate commerce. It is even possible that absurd arbitration results will be so unacceptable that employers may reevaluate their entire relationship with unions.

A perfect example of the disruptive effect of an irrational arbitral award is found in the accusation of the petitioners' international representative that the respondent's president telephoned him after the arbitration decision was received to inform him that the union was responsible for turning loose a dope dealer, that the union was a detriment to the City of Monroe, Louisiana, and that he was going to do everything he could, including talking to everyone he knew in Monroe, to destroy the union. *See* Jt. App.at 28-29 (affidavit in support of claim for attorney fees). Indeed, according to petitioners' representative at least, the offensive arbitration award in this case caused a potentially great disruptive effect on the stability of labor relations at respondent's facility. Respondent's president (in an affidavit) denied the remarks about destroying the union, but admitted that he told the union representative he was disappointed in the union's stance in backing that employee because of his drug problem, and that he was personally convinced that the reinstatement of the grievant would have a serious effect upon the younger employees in the plant by increasing and encouraging the possession or use of drugs on and off the job. *Id.* at 41. Absurd arbitration awards which have a disruptive effect upon the

workplace and upon national labor policy were not what respondent or other employers bargained for.

In this case, the company rule provided under the heading of *Causes for Discharge:*

> 1. Bringing intoxicants, narcotics, or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics, or controlled substances.

App. D of Pet. at 31a. The rule clearly banned the possession of just a residue or a large amount of marijuana by respondent's employees, and that is exactly what the respondent intended when it bargained for that rule. The rule does not require that the drug user be impaired at the time of the violation. Possession or consumption of drugs at the plant is the violation. The respondent did not bargain for the arbitrator's decision ignoring that rule, and the arbitrator's decision was so obviously against the public interest in reinstating a drug user to operating hazardous equipment that the public policy exception of *W. R. Grace* clearly was applicable to the case.

Petitioners argue that judicial refusal to enforce an arbitrator's award creates "a regime in which the employer exercises absolute and unlimited power." Brief for the Petitioners at 15. When the courts set aside an arbitrator's decision involving possession or use of drugs or alcohol, the petitioners argue that the employer in such cases is free to decide on its own whether to discharge or otherwise discipline the employee. This overlooks the fact that an employer still has to have "just cause" to terminate employees who are protected by a grievance-arbitration procedure, and an employer cannot gamble that a court will overturn an arbitration award. And if the union thinks the

employer has to much discretion, the union, too, can bargain for limitations upon that discretion. The only limitations that the courts have imposed upon drug possession cases are common sense limitations which the public policies of health and safety in the workplace dictate.

Nothing could be more devastating to respondent's efforts to stamp out dangerous drug use at its paper-converting plant than the reinstatement of a victorious grievant who flouted the no-drug rule and the criminal laws of this nation by his unquestionably illegal drug use and possession of marijuana at the plant. The banner would wave to all other employees that their union and the federal labor laws would protect illegal drug use. The employees will know that if grievant can get away with it, so can they. "Not only would there be serious tension and ill will between . . . the two employees and management, but, perhaps more important, reinstatement in such circumstances could well be and *invitation* to continue such misconduct on the part of the reinstated employees *as well as others.*" *NLRB v. Big Three Welding Equipment Co.*, 359 F.2d 77, 84 (5th Cir. 1966) (emphasis added). "[W]e cannot avoid the common sense implications that requiring the rehiring of [grievant] would have on other postal employees and on the public in general. Other postal employees may feel there is less reason for them to be honest than they believed--the Union could always fix it if they were caught." *United States Postal Service*, 736 F.2d at 825. The hostile atmosphere which developed at *S. D. Warren*'s plant when nondrug users were grouped together with drug users is an example of another strong consideration militating against reinstatement of a drug user. *See S. D. Warren*, 815 F.2d at 187.

II

EVEN IF THIS COURT WERE TO LIMIT THE PUBLIC POLICY EXCEPTION TO CASES IN WHICH AN ARBITRATION AWARD CONFLICTS WITH POSITIVE LAW, THE ARBITRATOR'S AWARD SHOULD BE VACATED BECAUSE IT EXCEEDS THE ARBITRATOR'S POWER, IS IRRATIONAL, IS IMPERFECTLY EXECUTED, AND IS A DISPENSATION OF "HIS OWN BRAND OF INDUSTRIAL JUSTICE"

Although the courts below vacated the arbitrator's award on public policy grounds, respondent further submits, as it did in its petition to the district court, Jt. App. at 4, that the arbitrator's award was properly vacated because it exceeds the arbitrator's power, is irrational,[8] is imperfectly executed, and is a dispensation of "his own brand of industrial justice." *Enterprise Wheel*, 363 U.S. at 597. The arbitrator's award does not comport with the

---

[8] In *Loveless v. Eastern Air Lines*, 681 F.2d 1272 (11th Cir. 1982), the court suggested that three grounds existed for substantive review of an arbitration award:

> (1) whether the award is irrational, *see, e.g., Gunther v. San Diego & Arizona E. Ry.*, 382 U.S. 257, 261 . . . (1965) ("wholly baseless and completely without reason") . . .;
>
> (2) whether the award draws its essence from the letter or purpose of the collective bargaining agreement, *United States Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. [574,] 597 [1960]. . .; and
>
> (3) whether the arbitrator conformed to a specific contractual limitation upon his authority . . . .

Loveless, 681 F.2d at 1276. Respondent urges these three grounds, *Interalia*, as a basis for overturning this arbitration award.

guidelines of the federal Arbitration Act, 9 U.S.C. § 10.[9]

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his *informed judgment* to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. . . . He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Enterprise Wheel, 363 U.S. at 597 (emphasis added).

Respondent bargained for this arbitrator's "informed judgment," not "his own brand of industrial justice." When an arbitrator does not bring his informed judgment to the case, the collective bargaining agreement is in effect breached. The aggrieved party must resort to the courts for relief. Respondent argued to the arbitrator that the grievant should not be reinstated because of his unfitness for employment and the public policy consideration with respect to plant safety. *See* App. D of Pet. at 41a. The arbitrator ignored this issue completely in his 33-page opinion and failed to make any finding whatsoever with respect to this very important issue. This was an abdication of his responsibility as an arbitrator.

The arbitrator's award exceeded his authority and dispensed his own brand of industrial justice when he determined that the respondent's exercise of discretion in disciplining grievant by discharging him was unreasonable because he found that the company rules say nothing about

---

[9] *See S. D. Warren Co. v. United Paperworkers' International Union*, 815 F.2d 178 (1st Cir. 1987) (the federal Arbitration Act provisions held applicable to labor arbitration).

immediate discharge, and because reading on duty and using or possessing marijuana did not have equal weight for purposes of discharge, although both are listed under the rules as causes for discharge. *Id.* at 45a. The arbitrator ignored the management rights clauses set forth above in the statement of the case and substituted *his discretion* for the *employer's discretion.*

Respondent successfully bargained for *extreme discretion* in the enforcement of its plant rules. It had the right to state which conduct was a dischargeable offense. Yet, the arbitrator states that because "reading on duty" is included as a cause for discharge, respondent's position, that discharge was warranted with respect to possession or use of marijuana at its plant in violation of the law, was not reasonable! On the basis of this specious reasoning, the arbitrator found that element two of the seven-element proof formula was not proven.[10]

At the same time, the arbitrator acknowledged that the respondent was in the paper-converting industry, that the industry was hazardous generally, and that the machine operated by grievant was particularly hazardous because of the sharp edges used to cut rolls of paper. App. D. of Pet. at 31a. The arbitrator even tracked the history of the marijuana problem at the plant and the efforts of management to stop it by holding meetings with employees warning them about violations of the rule prohibiting the possession and use of drugs at the plant. He recounted the problems with production and quality on grievant's shift and grievant's judgmental-type errors for which he received two reprimands. Despite all of this, he inexplicably found that respondent's position with respect to grievant's conduct was *unreasonable.* The arbitrator

---

[10] For the listing of the seven elements often used by arbitrators in a discharge case, see App. D of Pet. at 44a.

wrongfully *subtracted* from the collective bargaining agreement the respondent's discretion to determine what was a cause for discharge and what was not a cause for discharge.

The arbitrator also concluded that respondent failed to investigate before discharge and that the investigation was not fair, and, therefore, did not establish elements three and four. For instance, the arbitrator felt that "some higher, detached Company official, " *id.* at 47a, should have conducted the investigation. The Fifth Circuit observed that the arbitrator ignored his own findings that the company president "launched an investigation of the situation," with the assistance of the production supervisor. *Id.* at 39a. The arbitrator also ignored other of his own findings that "the management team met and they decided to have a meeting with the Grievant and some other employees they thought might have been involved," *id.*, that they in fact met with other employees possibly involved, that they had three interviews with grievant about the situation, that they discussed the situation with the local union president, and that all of this was done within a week and before grievant was terminated. *Id.* at 38a-40a. The arbitrator's reasoning is irrational and unfaithful to his obligation to utilize his "informed judgment."

The arbitrator's irrational reasoning does not end there, as he found as to element five "that the Company has not proven by *any level* of evidence that the Grievant was in violation of the Rule." *Id.* at 51a. (emphasis added). Although the police did not catch grievant with a marijuana cigarette in his hand, they did find a lit marijuana cigarette in his constructive possession.[11] Since the arbitrator accepted the police officer's testimony that grievant was in the car with a lit marijuana cigarette, his

[11] *State v. Smith*, 257 La. 1109, 1114, 245 So. 2d 327, 329 (1971) ("[A] person may be deemed to be in joint possession of a drug which is in the

conclusion that grievant was not in possession of marijuana is patently incorrect. The arbitrator did accept as established that grievant brought marijuana onto the plant on the night of January 21, 1983, in violation of the company rules.[12] However, the arbitrator refused to consider this evidence, even for the purposes of determining whether grievant was suitable for reinstatement or of corroborating the fact that on January 21, 1983, the grievant violated respondent's rule against the possession or use of drugs at the plant.

Grievant's arrest and subsequent plea of guilty to possessing two and one-half bags of marijuana, five

---

(footnote 11 continued)

physical custody of a companion, if he willfully and knowingly shares with the other the right to control of it."); *State v. Porter*, 296 So. 2d 302 (La. 1974) (conviction of defendant upheld although no marijuana was found on defendant, where marijuana was found near him on the ground and in his car where several friends were seated and from which he had exited two or three minutes before his arrest).

[12] The Fifth Circuit noted, with respect to the no-drug rule, the following:

> The rule draws no distinctions between "residue" and "usable quantities," nor need it do so. Yet, although [grievant] violated it, the award directs his reinstatement at work on the slitter-rewinder. This is contrary to *Amalgamated Meat Cutters*, in which there was no finding that the driver was drunk, only that he had taken a drink on the job. In adopting plant rules, an employer is not narrowly limited to denouncing acts already made criminal by the law but may, at a minimum, adopt reasonable prophylactic measures going beyond the statutes. As examples, we think it scarcely open to doubt that rules forbidding the introduction of drug paraphernalia onto plant premises (with or without the accompanying drugs) or firearms (loaded or not) would be valid--and the former a valid expression of the policy which we have discussed. If so, it follows that a rule forbidding the introduction on plant premises of marijuana in any quantity whatever would be equally so.

Misco, 768 F.2d at 742-43; App. A of Pet. at 6a-7a.

marijuana cigarettes, a weight scale, and marijuana cigarette paper at his home, and the action of grievant and his two companions in first stopping at grievant's car, in which marijuana was found by the police, before entering another car in which grievant and a lit marijuana cigarette were found and from which the police officer smelled marijuana smoke, all of which was accepted by the arbitrator as proven, corroborate respondent's conclusion that grievant had violated a company rule.[13] The arbitrator also ignored when considering this issue that there was evidence of drug use on the second shift and that grievant had been reprimanded twice for judgmental errors typical of drug-impaired employees. Respondent bargained for informed judgment, and not, as the Fifth Circuit described, a "baffling view of evidence," *Misco*, 768 F.2d at 741 n.2; App. A of Pet. at 3a, that lacks any degree of common sense. Rather, respondent received from the arbitrator a discussion of tangents that took him far from the real isues.

As to element six, the arbitrator found that respondent had discriminatorily enforced the rule prohibiting the possession or use of illegal drugs, although respondent had "presented *uncontroverted* testimony . . . that the rule had always been enforced," App. D. of Pet. at 51a (emphasis added), because "the Company did not present any specific evidence to support its contention." *Id.* He made this ludicrous finding because allegedly nothing was presented by respondent with respect to its actions concerning the *alcohol* found in the car where the smoking of the marijuana took place. In other words, the arbitrator is saying

---

[13] The arbitrator in *General Portland, Inc.*, 62 Lab. Arb. (BNA) 709, 714 (Autrey, Arb. 1974), would no doubt find that the confiscation of marijuana from grievant's vehicle "would be one type of evidence which would very strongly corroborate the testimony of the investigator." That arbitrator also stated that "[t]he testimony of a supervisor to the effect . . . that there had been discovered a partially smoked marijuana cigarette in the area frequented by [grievant] . . . could have been corroborating evidence." *Id.*

that because there was no evidence of the company's investigation of the alcohol, the company's enforcement of the rule against marijuana was discriminatory. Compounding this irrational approach, the arbitrator also ignored the testimony of the production manager that he had investigated the presence of the whiskey bottle in the car with the lit marijuana cigarette. Respondent submitted an affidavit from the production manager to the district court restating that testimony in order to preserve its right to challenge this arbitration award, Jt. App. at 42, as no transcript of the hearing was made. The arbitrator also ignored the management rights clause of the collective bargaining agreement which clause gave respondent the right to "unilaterally establish, modify, and enforce the plant rules" and which declares that "the company's failure to exercise any function or right . . . *shall not be deemed* a waiver of its rights to exercise such function or right." *Id.* at 14 (emphasis added). Respondent did not waive its right to discipline for drug use and possession by failing to discipline for alcohol possession. This exercise of arbitral reasoning is not the "informed judgment" respondent bargained for, but rather the arbitrator's "own brand of industrial justice."

Finally, the arbitrator determined that the degree of discipline, *i.e.*, discharge, was not reasonably related to the nature of the offense and the employee's past record. In so deciding, the arbitrator ignored grievant's reprimands on August 5, 1982, for performance problems, *id.* at 33, and on January 20, 1983, one day before his arrest, for running not one, but five rolls of paper at the wrong width through the slitter rewinder for which grievant was placed on a ninety-day probationary period. *Id.* at 34-35. The second reprimand even stated that one more mistake would cause permanent removal. *Id.* at 35. The grievant was on probation at the time he possessed and used marijuana at the plant, and yet the arbitrator found the discharge penalty too

severe and not reasonably related to grievant's past record. In *Grand Rapids Die Casting Corp. v. Local Union No. 159, United Automobile, Aerospace & Agricultural Implement Workers*, 684 F.2d 413 (6th Cir. 1982), the arbitrator improperly substituted his own procedural rules concerning discharge in place of those agreed upon by the parties in the collective bargaining agreement. "In setting aside [the] discharge for the reasons given the award did not draw its essence from the collective bargaining agreement. Rather, the arbitrator substituted terms and discipline he felt were reasonable for the terms of the agreement." *Id.* at 416. The arbitrator exceeded his power under the collective bargaining agreement by substituting his discretion for respondent's discretion to discipline by discharging grievant, Jt. App. at 19, especially when the misconduct is listed as one of the causes of discharge.

The only element the arbitrator found respondent to have proved was that grievant was forewarned. App. D. of Pet. at 44a-45a. Despite the overwhelming evidence of rule violation known to respondent at the time of grievant's discharge and the accepted evidence, although later discovered, of a clear violation of possession of marijuana at the plant, the arbitrator found deficiencies in the other six elements of proof although requiring a standard of proof, not of beyond a reasonable doubt, but merely that "the level of evidence must be truly substantial and not flimsy." *Id.* at 48a. "[I]f the reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling then the Court can strike down the award." *Safeway Stores v. American Bakery & Confectionery Workers International Union*, 390 F.2d 79, 82 (5th Cir. 1968).

The Fifth Circuit appropriately summarized the arbitrator's opinion and award as follows:

> The arbitrator in today's case, focusing chiefly on his conception of "industrial due process," ruled for [grievant] in great part because the employer did not at the time it discharged him *know* of the marijuana residue that he undeniably brought onto the plant parking lot. . . .
>
> . . . [I]t is that his narrow focus on [grievant's] procedural rights has led him to enter an award directing the employer to put [grievant] back to operating a hazardous machine, dangerous to himself and to others at a time when the arbitrator knew that in fact [grievant] *had* brought drugs onto company premises, in violation of Louisiana law and of a clearly-stated company rule. . . . Gazing at the tree, and oblivious of the forest, the arbitrator has entered an award that is plainly contrary to serious and well-founded public policy.
>
> Such an award overrides the employer's attempt to protect the safety of its employees, including [grievant], in the name of safe-guarding [grievant's] abstract procedural rights against a determination by the employer that the arbitrator knew was in fact true: that [grievant] *did* bring marijuana onto his employer's premises.

Misco, 768 F.2d at 743; App. A of Pet. at 7a.

This arbitration award is the arbitrator's "own brand of industrial justice," and should be set aside as in excess of the arbitrator's powers, as irrational, as unfaithful to the collective bargaining agreement, and as imperfectly executed.

CONCLUSION

The district court and the Fifth Circuit properly vacated the arbitrator's award reinstating a drug user to operating hazardous equipment as against public health and safety policy. The public policy with respect to the possession and use of illegal drugs in the workplace and their impact on public health and safety is well defined and dominant, and is ascertainable by reference to the laws and legal precedents. Following *W. R. Grace* the courts below properly exercised the public policy exception and vacated the arbitrator's award. Even if this Court adopts a narrow construction of the public policy exception and concludes that the above public policy is not included therein, the arbitrator's award should be vacated because it exceeds the arbitrator's power, is irrational, is imperfectly executed, and is a dispensation of "his own brand of industrial justice."

Based upon the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

A. RICHARD GEAR *
TIMOTHY B. BURNHAM
COOK, YANCEY, KING
& GALLOWAY
1700 Commercial National Tower
333 Texas Street
Shreveport, LA 71101-3621
(318) 221-6277

ATTORNEYS FOR
RESPONDENT,
MISCO, INC.

*Counsel of Record

Supreme Court, U.S.
FILED
OCT 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, *et al.*,

Petitioners,

v.

MISCO, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

LYNN AGEE
MARK BROOKS
3340 Perimeter Hill
P.O. Box 1475
Nashville, TN 37202

MICHAEL GOTTESMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

DAVID SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
I. The Scope of the Public Policy Exception In § 301 Cases	1
II. The Asserted Public Policy Bases For Vacating The Arbitration Award Here	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

Allis-Chalmers v. Lueck, 471 U.S. 202 (1985) ---- 2
Auto Workers v. Keystone Consolidated Industries, Inc., 782 F.2d 1400 (7th Cir. 1986), *vacated*, —— F.2d —— (7th Cir. 1987) ---------- 15
Baltimore & O.S.R. Co. v. Voigt, 176 U.S. 498 (1900) ---------- 8
Belves Co. v. Teamsters Local 968, 791 F.2d 1391 (9th Cir. 1986) ---------- 15-16
Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928) ---------- 8
Bowen v. United States Postal Service, 459 U.S. 212 (1983) ---------- 10-11
Chicago B&Q R.Co. v. McGuire, 219 U.S. 549 (1911) ---------- 9
Chicago Drivers Union v. Denton Cartage Co., 648 F.Supp. 1009 (N.D. Ill. 1986) ---------- 15
Culinary Union Local 226 v. Riverboat Casino, Inc., —— F.2d ——, No. 86-2104 (9th Cir. May 14, 1987) ---------- 16
Electrical Workers v. Hechler, —— U.S. ——, 55 L.W. 4694 (May 26, 1987) ---------- 20
Electrical Workers v. Otis Elevator, 314 F.2d 25 (2d Cir. 1963) ---------- 19
Enterprise Wire Co. (46 LA 359) ---------- 20
Drummon Coal Co. v. Mine Workers, 748 F.2d 1459 (11th Cir. 1984) ---------- 16
Hilton International Co. v. Union de Trabajadores, 600 F.Supp. 1446 (D.P.R. 1985) ---------- 16
Labor Board v. Insurance Agents, 361 U.S. 477 (1960) ---------- 2-3
Metropolitan Edison Co. v. Electrical Workers, No. 86-6553 (E.D. Pa. Aug. 14, 1987) ---------- 16
Muschany v. United States, 324 U.S. 49 (1945) --- 6
Northwest Airlines v. Air Line Pilots Association, 808 F.2d 76 (D.C. Cir. 1987), *petition for cert. pending*, No. 86-1548 ----------13, 14-15

TABLE OF AUTHORITIES—Continued

Page

Orange Belt Dist. Council of Painters v. Kashak, 774 F.2d 985 (9th Cir. 1985) ---- 16
736 F.2d 822 (1st Cir. 1984) ---- 11-12, 14
Postal Service v. American Postal Workers Union, Professional Administrators Ltd. v. Blevins, No. 86-5556 (6th Cir., May 26, 1987) ---- 15
Railroad Trainmen v. Terminal Co., 394 U.S. 369 (1969) ---- 2
Reiter v. Sonotone Corp., 442 U.S. 330 (1979) ---- 11
Richardson v. Mellish, 2 Bing. 229, 130 Eng. Rep. 294 (1924) ---- 1
S.D. Warren Co. v. Paperworkers, 815 F.2d 178 (1st Cir. 1987) ---- 12, 14
S.D. Warren Co., AAA No. 1130-0908-84 (Sept. 19, 1985) ---- 12
Steele v. Drummon, 275 U.S. 199 (1927) ---- 20
Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) ---- 1
Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960) ---- 1, 3, 14
Steelworkers v. National Can Corp., No. 86-C-7390 (N.D. Ill. June 11, 1987) ---- 16
Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960) ---- 1
Teamsters Local v. Lucas Flour Co., 369 U.S. 95 (1962) ---- 3
Teamsters Union v. Oliver, 358 U.S. 283 (1959) ---- 3
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) ---- 10
United States Postal Service v. Letter Carriers, 810 F.2d 1239 (D.C. Cir. 1987) ---- 14
United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290 (1897) ---- 9
Vidal v. Girard's Executors, 43 U.S. (2 How.) 127 (1844) ---- 8
W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983) ---- *passim*

TABLE OF AUTHORITIES—Continued

STATUTES: Page

Labor Management Relations Act of 1947, 29 U.S.C. § 301 ---------- *passim*
National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq. ---------- *passim*

MISCELLANEOUS:

6A *Corbin on Contracts* (1962) ---------- 8
14 S. Williston, *A Treatise on the Law of Contracts* (3rd Cir. 1972) ---------- 8
Restatement (Second) of Contracts ---------- 8, 9

REPLY BRIEF FOR THE PETITIONERS

In our opening brief we presented two alternative grounds on which the judgment below should be reversed: first, that in an action to enforce a labor arbitration award brought pursuant to § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 301 ("LMRA"), a court may not set aside the award as "contrary to public policy" unless the collective bargaining agreement, as interpreted by the arbitrator, violates positive law; and second, that even if the public policy exception to the general rules on enforcing arbitration awards stated in the *Steelworkers Triology*[1] were not so limited, there still would be no basis for concluding that the arbitration award at issue here offends public policy. We respond to the arguments of respondent Misco, Inc. ("Misco") and Northwest Airlines *et al.* as *amici curiae* ("NWA") as those arguments relate to our two principal contentions.

I. The Scope of the Public Policy Exception in § 301 Cases

1. Over one-hundred and fifty years ago the English courts recognized that public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you." *Richardson v. Mellish*, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824). The briefs of Misco and NWA confirm the acuity of that insight.

Misco and NWA vigorously contest our submission that the proper role for a court, in deciding whether a labor arbitration award is contrary to "public policy," is to determine whether the award gives the collective bargaining agreement an interpretation that violates positive law. But neither Misco nor NWA is able to suggest any other limiting principle to cabin the public policy exception within ascertainable metes and bounds.

---

[1] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

Indeed, at bottom, Misco and NWA defend the judgment below or the ground that § 301 is an unlimited grant of authority to the courts to define which collective bargaining agreements are enforceable and which are not. Misco invokes what it terms "common sense" as its basis for contending that the arbitral award at issue here violates the public policy favoring "safety in the workplace," Resp. Br. at 19; according to Misco "the courts must retain the power to vacate awards producing absurd results which fly in the face of public health and safety policy," *id.* at 25; *see id.* at 27-28. And NWA, while less bold in its rhetoric, advocates a "flexible 'public policy' exception," NWA Br. at 16, under which the courts are to decide, *inter alia*, whether "enforcement of the [arbitral] award would be 'so unfair' as itself to violate public policy" or whether "important policies would be inappropriately affected" by enforcing the arbitral award, *id.* at 10. Neither of these approaches would place any objectively-ascertainable limit on the courts' decisional processes.

2. Misco's and NWA's understanding of the public policy doctrine applied below makes plain the conflict between that doctrine and the national labor policy.

(a) As this Court has observed, in enacting the laws that govern labor relations Congress expressed its "clear disapproval of the[] free-wheeling judicial exercices" through which judges had invented a "'general' labor law" based on "self-mesmerized views of economic and social theory." *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 382-83 (1969). In particular, in the National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq. ("NLRA"), Congress delineated certain *mandatory* subjects of bargaining, *see* NLRA § 8(d), 29 U.S.C. § 158(d), and decreed that with respect to those subjects, so long as parties do not "contract for what is illegal," *Allis-Chalmers v. Lueck*, 471 U.S. 202, 212 (1985), "the parties should have wide latitude in their negotiations,

unrestricted by an governmental power to regulate the substantive solution of their differences," Labor Board v. Insurance Agents, 361 U.S. 477, 488 (1960) (emphasis added).

Under the public policy exception applied below and championed by Misco and NWA here, however, the government—through the judiciary—would once again be invested with a "free-wheeling" authority over labor relations and more specifically with the power "to regulate [the parties'] solution of their differences" by refusing to enforce any agreement which offended the courts' sense of public policy. Moreover, to the extent the courts exercised that power, the courts would frustrate Congress' attempt "to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations." *Teamsters Union v. Oliver*, 358 U.S. 283, 285 (1959). The end result would be to foment labor strife—and thereby defeat the fundamental purpose of the Act—by precluding the arbitral process from being available "as a substitute for economic warfare" in certain categories of disputes, *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962).

(b) Both Misco and NWA stress that under their version of the public policy exception, it is for the courts—and not for employers acting unilaterally—to decide whether an employer is obligated to comply with an arbitral award. But this ignores the fact that Congress' premise, in enacting the NLRA, was that the *parties*—and *not* the government—should decide the scope of an employer's rights and obligations through free collective bargaining so long as the parties' agreement is not contrary to positive law.

Moreover, Misco and NWA disregard the indisputable point that once a court declares a particular contractual provision to be contrary to public policy and therefore unenforceable, the effect of the ruling is to leave the employer with an unfettered discretion in all future cases

to decide how to proceed on a subject that the contract, by hypothesis, is intended to govern. Thus, for example, in the instant case, in setting aside the arbitrator's award as contrary to public policy, the court below necessarily concluded that the contractual limitations which the arbitrator found the parties had established to govern discharges generally are not legally enforceable with respect to the discharge of employees who are alleged to have used or possessed marijuana. The necessary consequence of that decision, for so long as it is left standing, is that, regardless of what contractual provisions are collectively bargained, employers in the Fifth Circuit's jurisdiction enjoy *carte blanche* authority to decide whether to retain or dismiss employees found with, or even near, marijuana. Not even Misco or NWA attempt to defend that result as consistent with the national labor policy.

(c) NWA suggests that the tension that exists between its version of the public policy exception and the national labor policy exists "equally" in the "well-established rule that when the arbitrator's decision manifests an 'infidelity' to his duty to render an award that draws its essence from the labor contract, 'courts have not choice but to refuse enforcement of the award.'" NWA Br. at 18. The difference between the two situations is plain.

When a court sets aside an arbitral award on the ground that the award does not "draw its essence from the labor contract," the court is *enforcing* the parties' agreement. Such a judicial decision assures that the parties are governed by the rules that they have agreed to in collective bargaining, and not by an arbitrator's "own brand of industrial justice," *Steelworkers v. Enterprise Corp.*, *supra*, 363 U.S. at 597. If one or the other of the parties is dissatisfied with the agreement (as construed by the court in refusing to enforce the arbitral award), the parties are free to negotiate a new provision to govern future situations of a similar nature. Thus, if a particular arbitrator oversteps his authority,

a decision correcting that error is hardly likely to lead to industrial strife.

A judicial decision invalidating an arbitral award on public policy grounds is different in kind. Such a decision, by definition, *defeats* the parties' solution to a problem they sought to resolve in collective bargaining and precludes the parties from negotiating an enforceable agreement to govern future situations. If the courts were empowered to exercise such authority in cases in which the employer is legally free to act in the manner the union desires, unions would be left with no option other than to use economic weapons to press their lawful position in comparable situations in the future.

Thus, a rule which permits the courts to refuse on public policy grounds to enforce arbitral awards which are consistent with positive law uniquely disserves the national labor policy.

3. Misco and NWA argue that notwithstanding this conflict with the national labor policy, *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983), compels a broad public policy exception under which the courts are to establish their own set of rules with respect to the enforceability of collective agreements. As we proceed to show, this is an incorrect reading of *W.R. Grace*.

(a) In *W.R. Grace*, this Court, after recognizing that "a collective-bargaining agreement that is contrary to public policy is not entitled to be enforced," *id.* at 766, *declined* the employer's invitation to set aside the arbitral award at issue in that case on public policy grounds. The Court did so even though that award required the employer to compensate employees who had been laid off in the order required by a conciliation agreement which the employer and the Equal Employment Opportunity Commission had signed and which a district court had held (in an action to which the employer, union and EEOC were parties) to be lawful and "binding on all parties," *id.* at 761; the arbitrator found that the order of layoffs dictated by this court-approved conciliation agreement

violated the seniority provisions of the collective bargaining agreement. Notwithstanding the evident tension between this arbitral award and the public policy favoring "obedience to judicial orders," *id.* at 767, and favoring "[v]oluntary compliance with Title VII [of the Civil Rights Act of 1964]," *id.* at 770, the Court concluded that the arbitral award was enttiled to be enforced. Given that holding, *W.R. Grace*, is an odd place for respondent and NWA to look for support for their broad and unbounded approach to the public policy exception.

(b) Misco seeks to derive comfort from the statement in *W.R. Grace* that before a court may set aside an arbitration award on public policy grounds the public policy "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests,'" 461 U.S. at 766, *quoting*, *Muschany v. United States*, 324 U.S. 49, 66 (1945). Misco claims "[t]his language permits broader sources of public policy than violations of positive law," Resp. Br. at 27. Misco is mistaken.

What Misco fails to recognize is that "positive law" is, of necessity, *defined* by "the laws and legal precedents." Thus, we do not deny—indeed, we readily acknowledge—that courts are not to enforce an arbitral award where the award interprets the contract to obligate the employer to commit a legal wrong as defined by the "laws and legal precedents" of the relevant jurisdiction or where compliance with the remedial order would constitute such a wrong; this is true regardless of whether the wrong is a statutory violation or a tort or other common-law wrong. Similarly, we agree that an arbitral award should not be enforced if there is a legal proscription on making an agreement of the type the arbitrator found the parties had made; again this is true regardless of whether the proscription is found in statute or in precedent.

What we do contend is this: if a collective bargaining agreement, as interpreted by an arbitrator, does *not* vio-

late positive law as thus defined, the courts are *not* free in a § 301 action to invoke the rubric of public policy to create a new set of rules to preclude the enforcement of such a contract. Rather, in such circumtsances the national labor policy requires that the parties' agreement be honored. Nothing in *W.R. Grace* is inconsistent with this proposition. To the contrary, the Court's caution against resort to " 'general considerations of supposed public interests,' " strongly supports the principled limitation on the public policy exception that we urge.

(c) NWA, in turn, deems it highly significant (*see* NWA Br. at 9-10) that, in the course of holding that the arbitral award in *W.R. Grace* did not violate public policy, this Court noted that: the employer had "committed itself voluntarily to two conflicting contractual obligations," 461 U.S. at 767; enforcement of the award "will not create intolerable incentives to disobey court orders," *id.* at 769; and placing the employer in the position in which it could not make layoffs without violating either its labor contract or its conciliation agreement was not "so unfair as to violate public policy," *id.* at 770. NWA apparently believes that each of these statements rejecting as factually unsupported the company's arguments for invalidating the arbitrator's award in that case was necessary to the Court's holding and that *W.R. Grace* not only holds that the award there was enforceable but also defines the situations in which such awards are not enforceable.

NWA's argument strains the opinion well beyond the breaking point. The rejection of certain arguments on the facts of a case should not be read as a commitment to recognize the proffered considerations as determinative in all future cases. Indeed, to so read *W.R. Grace* would turn the foregoing portions of the opinion against the narrow *holding* of the case as well as against the Court's strong admonition against resort to "general considerations of supposed public interests."

4. NWA places its principal reliance on the rules that the courts have evolved, as part of the common law of contracts, to determine the enforceability of those contracts which are governed by common law. NWA's reliance on those rules is doubly flawed.

(a) In developing the common law of contracts, the courts evolved a complex set of enforceability rules "touch[ing] upon matters of substance related to the public welfare" as distinguished from the rules governing "the bargaining process between the parties," *Restatement (Second) of Contracts*, Introductory Notes to "Unenforceability in General." The leading treatises on contract law each contain a volume or more delineating these enforceability rules and covering such topics as agreements "harmful to public service," agreements "harmful to the administration of justice," agreements in restraint of trade, etc.[2]

Moreover, although occasional expressions of judicial self-restraint can be found in the common-law cases defining public policy rules,[3] the common-law courts as a general matter "with or without misgivings . . . tended to heed the axion that 'whatever is injurious to the interests of the public is void, on the grounds of public policy.'" 14 S. Williston, *supra*, § 1629. Thus, at common law, agreements were denied enforcement based on the "practices of the community of people and their notions as to what makes for the general welfare" as those were "understood by judges and administrative officers." 6A *Corbin on Contracts*, *supra*, § 1374.

---

[2] 6A *Corbin on Contracts* (1962); *see* 14 S. Williston, *A Treatise on the Law of Contracts* (3rd ed. 1972).

[3] *See, e.g., Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127, 197-98 (1844) ("the courst are not at liberty . . . to look at general considerations of the supposed public interests and policy beyond what [the] constitution and laws and judicial decisions make known to us"); *Baltimore & O.S.R. Co. v. Voight*, 176 U.S. 498, 505 (1900); *Black and White Taxicab & Transfer Co. v. Brown & Yellow Transfer Co.*, 276 U.S. 518, 528 (1928).

On this basis contracts were held to be unenforceable if the contract contained a promise to engage in conduct deemed "offensive" to public policy or a promise "that tends to induce . . . such conduct." *Restatement (Second) of Contracts* § 178, *Comment d.* And of particular significance here, there are many situations at common law "in which the conduct [called for by a contract] is not itself against public policy, but it is against public policy to promise to engage in such conduct"; common-law judges thus developed a set of rules (such as the rules against agreements in restraint of marriage or detrimental to the marital relationship) which defined circumstances in which it is "objectionable to make a commitment to engage in conduct that is not in itself objectionable," *id.*

The quite far-reaching authority that common-law courts thus exercised in refusing to enforce contracts on public policy grounds was subject to one important limitation, however: that authority has always been recognized to be subordinate to the ultimate power of the legislative branch to fix public policy. As this Court put it long ago

> While the court, unaided by legislative declaration, and applying principles of the common law, may uphold or condemn contracts in light of what is conceived to be public policy, its determination as a rule for future action must yield to the legislative will when expressed in accordance with the organic law. [*Chicago B&Q R.Co. v. McGuire*, 219 U.S. 549, 565 (1911).]

Thus, the common law public policy doctrine incorporates the fundamental principle that "when the law-making power speaks on a particular subject over which it has constitutional power to legislative, public policy in such a case is what the statute enacts." *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340 (1897).

(b) To the extent the common-law rules have any relevance is this § 301 action, it is the limitation just noted—and not the expansive general rule— that is con-

trolling. As we have seen, the NLRA declares a public policy for labor-management relations, one that defines the area of mandatory bargaining and provides that within that area, so long as the parties do not flout positive law, they are to be left free to make and enforce their own agreements and resolve disputes under those agreements. Under the common-law public policy doctrine, that *statutory* policy must prevail over any otherwise-applicable common-law notions which are inconsistent with the NLRA, such as the proposition that judges may define subjects as to which it is "objectionable" for an employer "to make a commitment," p. 9, *supra*.

But even if the common law doctrine did not itself establish the primacy of the NLRA in fixing public policy within the area to which the Act applies, there still would be no basis to allow common law considerations to trump the national labor policy. This is, after all, a § 301 action, and the ultimate question here is what authority that section confers on the courts to refuse to enforce collective bargaining agreements which are consistent with positive law. And that question, like all questions arising under § 301, is to be answered by "federal law, which the courts must fashion from the policy of our national labor laws," *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

Indeed, for that very reason this Court has heretofore rejected analogous attempts to equate § 301 law with the common law of contracts. As Justice Powell explained in his opinion for the Court in *Bowen v. United States Postal Service*, 459 U.S. 212, 220 (1983):

> The difficulty with this argument is that it treats the relationship between employer and employee, created by the collective-bargaining agreement, as if it were a simple contract of hire governed by traditional common law principles. [Such an argument] fails to recognize that a collective-bargaining agreement is much more than traditional common-law employment terminable at will. *Rather, it is an agreement creating relationships and interests under the*

federal common law of labor policy. [Emphasis added.] [4]

In sum, NWA's reliance on the common law misunderstands both the limits on the public policy doctrine that existed at common law and also the limits § 301 places on the use of common law concepts in enforcing labor contracts.

5. Misco and NWA attempt to defend the indefinite public policy exception they advocate on the ground that the courts can be expected to proceed with moderation in invalidating arbitration awards on public policy grounds. *See* Resp. Br. at 27; NWA Br. at 17. The argument is ultimately besides the point because, as we have seen, the national labor policy does not leave room for even the moderate use of an unstructured judicial power to overturn otherwise lawful agreements reached through collective bargaining. But even if the argument were somehow relevant, it is not supported by the experience in the four years since *W.R. Grace* was decided.

That experience is perhaps best summarized by considering the very cases to which Misco and NWA point. *Postal Service v. American Postal Workers Union* (*"APWU"*), 736 F.2d 822 (1st Cir. 1984), provides a useful illustration. There the court refused to enforce an award providing for the reinstatement of an employee who was discharged for embezzling a small amount of money from the Postal Service. The arbitrator entered

---

[4] NWA claims that *W.R. Grace* compels application of the common law rules because the decision states that, "[a]s with any contract . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy." 461 U.S. at 766. But this sentence does not say that the *same* public policy rules apply under § 301 as are applied in an ordinary contract case. *Cf., Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("The language of an opinion is not always to be parsed as though we were dealing with the language of a statute"). And, as we have seen, common-law rules correctly understood do not in the final analysis help NWA here because the common law itself recognizes the primacy of statutes in declaring public policy.

that award after finding that the grievant had worked for the Postal Service for seven years without committing any misdeeds; that he had been under "unusual financial pressures" at the time of the embezzlement; and that the grievant intended to repay the Postal Service and indeed had retained records for that very purpose and had made some repayments. Moreover, the arbitrator had ordered grievant reinstated (following a long disciplinary suspension) to a position *in which he would not be handling money*. The court of appeals found that award to violate the public policy.

Similarly, in *S. D. Warren Co. v. Paperworkers*, 815 F.2d 178 (1st Cir. 1987), the court declined to enforce an award requiring the reinstatement of three (out of four grievants) discharged for selling small amounts of marijuana to an undercover agent at the employer's plant. The arbitrator found that each grievant "was the only female worker in her area of the mill"; that the undercover agent "was exceptionally sympathetic and helpful to [the grievants]"; that the agent "was the first to bring up the subject of marijuana, that he talked about it incessantly to the point where each [grievant] concluded that maybe if she satisfied [the agent's] persistent requests, he would leave her alone"; that the grievants had not brought marijuana "into the mill for their own use" and had not used the marijuana at the mill; that the grievants would not engage in similar conduct if reinstated; and that the discharges "were excessively harsh in light of [the employer's own] past disciplinary practice for similarly serious . . . violations" of the rule on which the employer relied.[5] The discharge of the one grievant who actually was guilty of using marijuana during work time was *sustained* by the arbitrator. The court of appeals concluded that public policy precluded the reinstatement of the other three grievants.

---

[5] All quotations are from the arbitrator's award in *S. D. Warren Co.*, AAA No. 1130-0908-84 (Sept. 19, 1985). A copy of the decision is being lodged with the Clerk of this Court.

In contrast, Misco and NWA denounce the decision in *Northwest Airlines v. Air Line Pilots Association*, 808 F.2d 76 (D.C. Cir. 1987), *petition for cert. pending*, No. 86-1548, in which a panel of the D.C. Circuit (Edwards, Bork and Swygert, JJ) enforced an arbitration award directing the reinstatement of a pilot who had been discharged on alcohol-related grounds. Misco and NWA claim the court should have set aside the award on public policy grounds. But the arbitrator there found that the grievant had suffered from alcoholism, a treatable disease for which the grievant had, in fact, sought and received treatment followning his discharge, and the arbitrator further found that the employer itself had a policy of employing reformed alcoholics as pilots. Given these findings and the grievant's unblemished record of sixteen years of service to the employer, the arbitrator concluded that the grievant should be reinstated if, *but only if*, the Federal Air Surgeon certified that the grievant had "recovered from the effects of his alcoholism, including total abstinence from alcohol for not less than two years," 808 F.2d at 77-78. Misco and NWA contend that "public policy" requires that the airline be left free to refuse to reinstate a pilot whom the Federal Air Surgeon deemed fit for duty.[6]

What these cases and the others cited by Misco and NWA have in common is that they required a most profound human judgment: determining the appropriate level of "punishment" for the "crime" which the griev-

---

[6] *The Federal Aviation Administration permits* a recovered alcoholic to return to the cockpit without proving that he has been alcohol-free for two years if the pilot has been treated for and is found to have recovered from his alcoholism and if the airline provides monthly reports about the pilot, and the pilot's treatment program provides quarterly reports. The arbitrator in *Northwest Airlines* refused to allow the grievant to return under these conditions, but rather required the grievant to wait until he obtained an unconditional FAA license based on two years of abstinence. The net result of the arbitrator's decision was to leave the grievant without pay or benefits for close to three years.

ants were found to have committed.[7] More specifically, the arbitrators in these cases were called upon to decide whether the conduct of the grievants provided "just cause" for imposing the penalty of discharge which is commonly understood to be the industrial equivalent of capital punishment. A host of factors are, or may be thought to be, relevant in answering such a question including, *e.g.*, the nature of the offense, the nature of the offender, the need to deter future wrongdoing, and the possibility of rehabilitating the offender.

Determining how much weight should be given to these various factors in general or in a particular case is precisely the type of issue the collective bargaining process—including the grievance-arbitration procedure which is part of the "continuous collective bargaining process," *Steelworkers v. Enterprise Corp.*, *supra*, 363 U.S. at 597—was created to resolve. The question so posed is not one to which there is a simple answer or an answer that is objectively "correct." Nor is it a question to which the law dictates an answer; indeed state legislatures tend to establish a range of penalties for analogous criminal offenses and leave it to the sentencing judge to decide within that range what penalty is "just" in a particular case. Yet in *APWU and S.D. Warren* the First Circuit took it upon itself to remove this matter from the ambit of collective bargaining on the simplistic ground that because the grievants in those cases had committed acts against public policy, any punishment less than the ultimate one (*i.e.*, less than discharge) necessarily violates public policy. And in *Northwest Air-*

---

[7] *United States Postal Service v. Letter Carriers*, 810 F.2d 1239 (D.C. Cir. 1987), which NWA (at 15), cites as another example of an award that should have been overturned on public policy grounds is similar: there the court enforced an award directing reinstatement of a grievant who had unlawfully delayed the mails, but the arbitrator predicated the reinstatement order on proof that the grievant—a compulsive gambler—had attending a gamblers anonymous program and had ceased gambling, and the arbitrator ordered the grievant to cooperate fully with the employer in assuring that the grievant did not return to gambling.

lines, according to Misco and NWA, the court should have done likewise.

In sum, the very cases on which Misco and NWA rely demonstrate that what is being advocated here is a "modest proposal" in the sense in which Jonathan Swift used that phrase.[8]

In the final analysis however, no decision can fully demonstrate the dangers of an amorphous public policy exception for the greatest risk is not that such an exception would be regularly abused by the courts, but rather that such an exception, because it is inherently formless, would invite (or at least permit) frequent litigation challenging arbitration awards. Although NWA asserts that there "has been no stampede to the courthouse by employers seeking to overturn arbitral reinstatement awards," NWA Br. at 16, the fact of the matter is that since *W.R. Grace*, there has been a significant increase in the number of public policy challenges to arbitral awards. Most of these challenges have been unsuccessful—and many frivolous—but almost all of them have proven costly and time-consuming to litigate.[9] And as

---

[8] Moreover, by focusing on a handful of circuit court cases, Misco and NWA are able to obscure the lengths to which some courts have been willing to go to overturn arbitration awards in the name of public policy. *Chicago Truck Drivers v. Denton Cartage Co.*, 649 F. Supp. 1009 (N.D. Ill. 1986), best reveals the danger of the indefinite public policy exception Misco and NWA here urge: in that case the court refused to enforce a default judgment entered against an employer by a joint grievance committee on the ground that the decision "violates the fundamental public policy of ensuring due process in legal disputes." *Id.* at 1012. *See also, e.g., Auto Workers v. Keystone Consolidated Industries, Inc.*, 782 F.2d 1400 (7th Cir. 1986), *vacated*, —— F.2d —— (7th Cir. 1987) (contract requiring employer to make pension contributions violates public policy); *Professional Administrators Ltd. v. Blevins*, No. 86-5556 (6th Cir., May 26, 1987) (arbitration award sustaining pension trustees action in increasing contribution rates violates public policy).

[9] *See, e.g., Bevles Co. v. Teamsters Local 968*, 791 F.2d 1391 (9th Cir. 1986) (four years to sustain arbitration award requiring

we stated in our opening brief, it is doubtful at best whether an arbitral system whose results are so frequently subject to challenge can long survive.

6. Misco and NWA argue finally that limiting the public policy exception to cases of conflict with positive law would lead to "absurd" (Resp. Br. at 19, 25, 27-28) or "dangerous" (NWA Br. at 20) results. The best refutation of that claim comes from the fact that neither Misco nor NWA is able to point to even a single case in which their fears were realized, or would have been realized under the principled public policy exception we urge. Indeed, as we have seen, the very cases on which Misco and NWA rely prove precisely the opposite.

Nor is it at all surprising that a broad judicial power to overturn arbitration awards is not necessary to avoid "absurd" or "dangerous" decision. The collective bargaining process, after all, is not likely to lead to the imposition of "absurd" or "dangerous" obligations on employers; aside from anything else, it is simply not in the self-interest of either party to propose or agree to such

---

reinstatement of undocumented aliens); *Orange Belt. Dist. Council of Painters v. Kashak*, 774 F.2d 985 (9th Cir. 1985) (two years to sustain arbitration decision holding employer bound by pre-hire agreement); *Culinary Union Local 226 v. Riverboat Casino Inc.*, —— F.2d ——, No. 86-2104 (9th Cir., May 14, 1987) (public policy challenge to award finding parties had reached an implied agreement governing the recall of striking employees); *Drummon Coal Co. v. Mine Workers*, 748 F.2d 1495 (11th Cir. 1984) (public policy challenge to arbitral award holding that employee who waited ten days after a layoff to notify the employer of a desire to return to work did not forfeit his recall rights); *Metropolitan Edison Co. v. Electrical Workers*, No. 86-6553 (E.D. Pa., Aug. 14, 1987) (public policy challenge to award holding that contract bars employer from unilaterally implementing random drug testing program) *Steelworkers v. National Can Corp.*, No. 86-C-7390 9 N.D. Ill., June 11, 1987) (public policy challenge to award ordering company to reinstate an employee returning from disability leave to employee's old job); *Hilton International Co. v. Union de Trabajadores*, 600 F. Supp. 1446 (D.P.R. 1985) (public policy challenge to award ordering reinstatement of employee discharged for pressing for higher tips).

terms. Nor is there any reason to suspect that arbitrators are more likely than judges to render "absurd" or "dangerous" awards under labor contracts; to the contrary, as the National Academy of Arbitrators demonstrates in its brief *amicus curiae* (at 15-20), arbitrators "necessarily . . . take into account that public policy relating to the justice of the discipline," *id.* at 15.

Moreover, to the extent that particular categories of employees *do* in fact pose a public danger, state legislatures and the United States Congress can be counted on to enact legislation safeguarding the public. It is hardly uncommon for legislatures at the state and federal level to enact laws that require persons performing particular tasks to obtain a license from the government; such laws are the rule, for example, in the transportation industry. And it is likewise quite common for legislatures and regulatory bodies to enact conditions on the granting of such licenses in order to protect public safety. Thus Misco's suggestion that confining the courts to enforcing positive law would "completely gut *W. R. Grace* of any meaning whatsoever," Resp. Br. at 27, is simply wrong.

In sum, the fears conjured up by Misco and NWA as to the evils of enforcing arbitral awards which are consistent with positive law prove, on inspection, to be illusory. In contrast, the dangers of the broad public policy exception applied by the courts below and advocated by Misco and NWA here are quite real and threaten fundamental aspects of the national labor policy.

II. The Asserted Public Policy Bases For Vacating The Arbitration Award Here

Even if, *arguendo*, Misco and NWA were correct in arguing that the courts in § 301 cases may refuse on public policy grounds to enforce arbitral awards which accord with positive law, it still would not follow that the court below properly refused to enforce the instant arbitration award. Indeed, Misco and NWA fail to provide any principled basis to justify the decision below.

1. At the threshold, it is important to bear in mind that, as we explained in our opening brief (at 4-5), the arbitral decision at issue here ultimately rests upon *procedural* and not substantive grounds. The Arbitrator did not decide whether possession of marijuana on company premises justifies discharge; all that the Arbitrator concluded is that the instant discharge could not be sustained on such a ground because Misco had not relied on this ground in effecting the discharge. What the Arbitrator held, then, is merely that "[a]n employee should know the offense with which he is charged and have the opportunity to defend his behavior," Pet. App. at 45a, and that those discharged on marijuana charges are entitled to this right. Neither Misco nor NWA makes any attempt to show how such a limited ruling—one which may not even foreclose the Company from attempting to discharge the grievant again for possessing the gleanings of marijuana in his car, so long as the Company expressly predicates the discharge on that ground—can conceivably violate public policy.

2. Rather than addressing the decision that the Arbitrator, in fact, rendered, Misco and NWA proceed as if the Arbitrator had decided, as a matter of substantive law under the parties' contract, that at discharge for possessing marijuana would not be contractually justified. Even if the Arbitrator had so held, the decision below overturning the award could not be sustained.

(a) Misco demonstrates that it is against the policy of the United States and Louisiana to possess marijuana. *See* Resp. Br. at 13-14. But the statutes on which Misco relies also establish the legislative judgment as to the appropriate penalty for such offenses, and those laws do not provide for the forfeiture of employment as part of the penalty. As the Second Circuit recognized long ago (in an opinion by then-judge, now Justice Marshall)

> In light of the important role which employment plays in implementing the public policy of rehabilitating those convicted of crime, there can hardly be

> a public policy that a man who has been convicted, fined, and subject to serious disciplinary measures can never be ordered reinstated to his former employment. [*Electrical Workers v. Otis Elevator Co.*, 314 F.2d 25, 29 (2d Cir. 1963).]

Moreover, as we previously observed, determining the appropriate penalty for a particular offender who has committed a particular offense is one of the most difficult and complex judgments human beings are called upon to make. Public policy probably cannot—and in all events does not—provide a clear answer to that question. Thus, the fact that the grievant here may have committed a criminal act does not in and of itself establish that the reinstatement order violates public policy.

(b) Misco and NWA place their principal reliance on the "public policy" favoring safe workplaces in an attempt to justify the lower court's refusal to enforce the arbitration award. *See* Resp. Br. at 18; NWA Br. at 20. These arguments proceed from a premise contrary to the facts.

Although Misco and NWA pretend otherwise, the Arbitrator here found, as a matter of fact, that Misco *failed* to prove that the grievant was guilty of using marijuana during work time. The only offense of which the grievant was even arguably found guilty was leaving in his car a plastic scale case (for a scale that grievant kept at home) which case contained gleanings of marijuana. Thus it simply is not true, as NWA asserts (at p. 20 of its brief), that the grievant "has already shown his disregard for his own physical safety and the safety of others." And the asserted "public policy against the operation of dangerous machinery by persons under the influence of drugs or alcohol" which Misco invokes (at p. 18 of its brief) is not implicated here, as this case does not involve an individual found to have engaged in (or to be likely to engage in) such misconduct.

Under even the broadest variant of the common law doctrine permitting the courts to refuse to enforce ordinary contracts on public policy grounds "it must be

clearly established that public policy would be violated before [one] may raise that objection to prevent enforcement of the contract." *Steele v. Drummond*, 275 U.S. 199, 206 (1927). *A fortiori*, such clear proof must be required in the § 301 context. Misco completely fails to provide such proof here.[10]

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

---

[10] Misco alternatively argues that the arbitration award was not entitled to enforcement because the arbitrator "exceeded his authority and dispensed his own brand of industrial justice." Resp. Br. at 32. Ordinarily we would suggest that such an argument—which was not passed upon by the court of appeals—would warrant review by the lower court in the first instance. *Cf. Electrical Workers v. Hechler*, —— U.S. ——, 55 L.W. 4694, 4698 (May 26, 1987). In the instant case, however, we believe the argument is so plainly without merit that it should be summarily disposed of by this Court.

The Arbitrator in this case stated seven criteria, "based on the questions set forth by Arbitrator Daugherty in an appendix to *Enterprise Wire Co.* (46 LA 359), for determining whether just cause exists for a discharge." Pet. App. at 43a-44a. Misco does not deny that these criteria "draw their essence" from the collective bargaining agreement.

The Arbitrator went on to find that the Company had failed to prove "the charge against the employee," *id.* at 44a, and the Arbitrator concluded (as previously noted) that the discharge could not be sustained on grounds not relied upon the company in effecting the discharge, p. —, *supra*. This was the dispositive basis for the decision. The rule the Arbitrator thus applied—that a discharge can be sustained only on the grounds on which the discharge was based—is a rule which arbitrators generally follow in just-cause cases. *See* Pet. Br. at 5 n.5. We are at a loss to understand—and Misco does not explain—how the Arbitrator "exceeded his authority" in following that rule here. That being so, Misco's attack on various statements made by the Arbitrator in the course of discussing the *other* criteria—even if the attack were justified (and it is not)—is, in any event, beside the point, for the *dispositive* ground of the Arbitrator's decision is not subject to challenge.

Respectfully submitted,

LYNN AGEE
MARK BROOKS
3340 Perimeter Hill
P.O. Box 1475
Nashville, TN 37202

MICHAEL GOTTESMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

DAVID SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Counsel for Petitioners

Supreme Court, U.S.
FILED
MAR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-651

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO AND OUACHITA LOCAL 654,
Petitioners

v.

MISCO, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ACADEMY OF ARBITRATORS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

DAVID E. FELLER *
Special Counsel
Boalt Hall
Bancroft at Piedmont
Berkeley, CA 94720
(415) 642-0629

WILLIAM P. MURPHY
President, National Academy of Arbitrators
School of Law
University of North Carolina
Chapel Hill, North Carolina 27514
(919) 962-4124

Attorneys for the National Academy of Arbitrators

Of Counsel:

JAN VETTER
Boalt Hall
Berkeley, CA 94720
(415) 642-0821

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST AND CONCERN OF THE AMICUS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. Whether Or Not A Court May Refuse To Enforce An Arbitrator's Award For Reasons of "Public Policy," The Decision Below Must Be Reversed	5
II. Under Agreements Providing For Review Of The Imposition of Discipline On A "Just Cause" Standard The Arbitrator Is Authorized To Consider Questions Of Industrial Justice	8
III. In Determining Whether Standards of Industrial Justice Have Been Met, Arbitrators Are Authorized To And Do Decide Questions Of Public Policy And, In Particular, Public Policies Relating To Safety	15
IV. A Court Should Not Set Aside An Arbitrator's Decision As To The Justice Of Discipline On Public Policy Grounds Unless The Remedy Prescribed By The Arbitrator Would Require A Violation Of Law	20
V. Federal Labor Policy Requires A Strong Re-Affirmation of the Rule Of *Enterprise Wheel & Car* And The Rejection Of An Expansive Public Policy Exception	26
CONCLUSION	30

TABLE OF AUTHORITIES

Cases	Page
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	10
Amalgamated Meat Cutters v. Great Western Food Co., 712 F.2d 122 (5th Cir. 1983)	14
American Postal Workers v. United States Postal Service, 682 F.2d 1280 (9th Cir. 1982)	22
A.T.&T. Technologies, Inc. v. Communications Workers, —— U.S. ——, 106 Sup. Ct. 415 (1986)	2, 9
Black v. Cutter Laboratories, 43 Cal.2d 788 (1955), *cert. dismissed*, 352 U.S. 859 (1956)	25
Botany Industries v. N.Y. Joint Board, 375 F. Supp. 485 (S.D.N.Y. 1974)	22
Boys Markets v. Retail Clerks, 398 U.S. 235 (1970)	26, 27
Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976)	27
E.I. DuPont Co. v. Grasselli Employees Association, 790 F.2d 611 (7th Cir. 1986), *cert. denied*, 55 LW 3235	24
Evans Products Co. v. Millmen's Union No. 550, 159 Cal.App.3d 815, 205 Cal.Rptr. 731 (1984)	21
Gateway Coal Co. v. United Mine Workers, 466 F.2d 1157 (3d Cir. 1972)	23
Gateway Coal Co. v. United Mineworkers, 414 U.S. 368 (1974)	22, 27
General Warehousemen v. Standard Brands, 579 F.2d 1282 (5th Cir., 1978), *cert. den.*, 441 U.S. 957 (1979)	21
Meat Cutters Local No. P-1236 v. Jones Dairy Farm, 680 F.2d 1142 (7th Cir. 1982)	25
Muschany v. United States, 324 U.S. 49, 66 (1945)	25
Republic Steel Co. v. Maddox, 379 U.S. 650 (1965)	28
Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960)	9
Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
Steelworkers v. Warrior & Gulf Navigation Co., 365 U.S. 574 (1960)	9, 23
Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962)	26, 27
Teamsters Local 249 v. Consolidated Freightways, 464 F. Supp. 2699 (W.D.Pa. 1979)	22
United States Postal Service v. American Postal Workers Union, 736 F.2d 822 (1st Cir. 1984)	14
Vaca v. Sipes, 386 U.S. 171 (1967)	28
W.R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757 (1983)	5, 25
Arbitration Decisions	
Armstrong Rubber Co., 77 LA 775 (A.M. Koven, 1981)	19
Asarco, Inc., 76 LA 163 (H.H. Grooms, 1981)	16
Atchison, Topeka & Santa Fe Ry. Co., 87 LA 972 (J.R. Johnson, 1986)	19
Cities Service Co., 77 LA 1180 (C.C. Brisco, 1982)	16
Consolidation Coal Co., 87 LA 729 (R. Hon, 1986)	16
Evans Products Co., 70 LA 526 (Feller, 1978)	21
Indianapolis Power and Light Co., 87 LA 826 (M.M. Volz, 1986)	16
Lanter Co., 87 LA 1300 (J.R. Thornell, 1987)	18
Morgan Adhesives, 87 LA 1039 (R.I. Abrams, 1986)	19
Riley Stoker Corp., 7 LA 764, 767 (H. Platt, 1947)	13
Signal Delivery Service, Inc., 86 LA 75 (E.M. Weis, 1985)	19
Springfield Mass Transit District, 80 LA 193 (V. Gunther, 1983)	19
Washington Metropolitan Area Transit Authority, 82 LA 150 (H.N. Bernhardt, 1983)	19
Wayne State University, 87 LA 953 (N. Lipson, 1986)	18

TABLE OF AUTHORITIES—Continued

Collective Bargaining Agreements	Page
Bureau of National Affairs, Collective Bargaining Negotiations and Contracts (Looseleaf, 1987)	11
Bureau of National Affairs, Labor Relations Cumulative Digest and Index	29
Litton Industrial Products, Inc. and Machinists (exp. 6/83)	11
United States Steel Corp. and Steelworkers (exp. 8/86)	11, 14
Statutes and Regulations	
Executive Order 12564, 51 Fed. Reg. 32889 (Sept. 15, 1986)	18
Labor Management Relations Act, Section 301, 29 U.S.C. § 185	20
Meat Inspection Act, 21 U.S.C. §§ 602 ff	25
5 U.S.C. § 7311	22
Other Authorities	
Blumrosen, Public Policy Considerations in Labor Arbitration Cases, 14 Rutgers L. Rev. 217 (1960)	15
Elkouri & Elkouri, How Arbitration Works (4th Ed. 1985) 675-676	7
Fairweather, Practice and Procedure in Labor Arbitration (2nd Ed. 1983) 303	7
Feller, *The Impact of External Law*, in The Future of Labor Arbitration in America 83, 90 ff. (1976)	21
Jennings, Sheffield and Walters, *The Arbitration of Discharge Cases: A Forty-Year Perspective*, 38 Lab. L.J. 33, 39-40 (1987)	12
Jones, *The Role of Arbitration in State and National Labor Policy*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators (1971) 42, 53	15
Kadish, *The Criminal Law and Industrial Discipline As Sanctioning Systems*, in Labor Arbitration Perspectives and Problems, Proceedings of the Seventeenth Annual Meeting, National Academy of Arbitrators (1964) 125	12

TABLE OF AUTHORITIES—Continued

Page

Morris, *Twenty Years of Trilogy: A Celebration*, in Decisional Thinking of Arbitrators and Judges, Proceedings of Thirty-Third Annual Meeting, National Academy of Arbitrators 331, 351ff (1981) 28

Perez-Reyes, Guiseppi, Mason and Davis, *Passive Inhalation of Marijuana Smoke and Urinary Excretion of Cannabinoids*, 34 Clinical Pharmacology and Therapeutics, No. 1, p. 36 (1983) 8

St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, in Arbitration—1977, Proceedings of the Thirtieth Annual Meeting, National Academy of Arbitrators 29, 30 (1978) 20

T.S. Denenberg and R.V. Denenberg, Alcohol and Drugs: Issues in the Work Place (1983) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-651

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO AND OUACHITA LOCAL 654,
Petitioners

v.

MISCO, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE NATIONAL ACADEMY OF ARBITRATORS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST AND CONCERN OF THE AMICUS

The National Academy of Arbitrators was founded in September 1947. Its membership is limited to those who have substantial and current experience as impartial arbitrators of labor-management disputes so as to reflect general acceptability by the parties, or those with limited but current experience in arbitration who have attained

general recognition through scholarly publication or other activities as impartial authorities on labor-management relationships. Its principle purposes are "to establish and foster high standards and competence among those engaged in the arbitration of labor-management disputes on a professional basis; to adopt canons of ethics to govern the conduct of arbitrators; to promote the study and understanding of the arbitration of labor-management disputes." It is co-author, with the American Arbitration Association and the Federal Mediation and Conciliation Service, of the Code of Professional Responsibility for arbitrators of Labor-Management Disputes. As of September 1985 the membership of the Academy totalled approximately 637. The annual meetings of the Academy are the occasion for the presentation of papers by scholars, arbitrators and representatives of labor and management dealing with the nature of the arbitration process, its relationship to the law and the conduct of labor-management relationships in general. The proceedings of the annual meetings are published by the Bureau of National Affairs and constitute the most authoritative collection in existence of the materials on the arbitration process.

This is the second *amicus curiae* brief filed by the Academy in this Court. The first was in *A.T.&T. Technologies, Inc. v. Communications Workers of America*, October Term, 1985, No. 84-1913, decided April 7, 1986. As in that case the brief filed, with the consent of the parties, because the Academy believes that if the law is to be involved in the arbitration process, as Congress in effect mandated by enacting Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. § 185), that involvement should serve to effectuate the purposes for which unions and employers have established that process. The course of this Court's decisions with respect to arbitration have, we believe, served that purpose. Because this case has the potential for disturbing the regime

established by the prior decisions of the Court, the Academy has undertaken to file this brief. The importance of the case is not the result for the particular parties involved. The importance, rather, is in the doctrine announced in the case as it affects the relationship between the courts and the arbitration process in the countless other cases which may follow in the future. It is our hope that this brief will assist the Court in understanding the context in which cases such as the present one arise and in announcing doctrine which will support rather than undermine a process that both unions and employers have found to be desirable.

SUMMARY OF ARGUMENT

In order to reach the conclusion that public policy dictated reversal of the arbitrator's decision ordering reinstatement in this case the court below first had to reverse both his interpretation of the collective bargaining agreement and his findings of fact, in violation of the principles set forth by this Court in *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). There was no evidence that the grievant had operated dangerous machinery under the influence of drugs or alcohol. The court could have concluded that the public policy against such operation required vacation of the arbitrator's award only by making a totally unwarranted substitution of its own belief or beliefs for the arbitrator's conclusion on the facts.

Even assuming that the court below was justified in so doing, and that the grievant had violated the rule against the use of marijuana on company property, the court should not have reversed on public policy grounds the arbitrator's order of reinstatement. Analysis of that question requires a description of the arbitrator's role in disciplinary cases. It is true that the arbitrator is authorized only to interpret and apply the express or implied provisions of the agreement. But where an agreement

provides for review of the discipline imposed by the employer, the arbitrator is usually given authority to decide whether the discipline imposed was "just."

The first issue in any discharge case is whether the discharged employee has committed the offense with which he has been charged. Unless the agreement otherwise provides, however, a finding of "guilty" does not end the matter. In the usual case, as in this case, the agreement provides that the employer's power to discipline or discharge may be exercised only for "just cause." And in the determination of that question, the arbitrator in the usual case is empowered to reduce the penalty and provide an appropriate remedy.

In determining the justice of the discipline imposed by an employer, as well as in prescribing the appropriate remedy where there is not, the arbitrator is authorized by the agreement to decide any questions of public policy relating to those issues. This is particularly true with respect to issues of public safety. Examination of arbitrators' decisions in disciplinary cases shows that arbitrators not only have the authority to rule on public policy questions in such cases but exercise it.

Since the parties have vested in the arbitrator the authority to consider public policy in determining whether there was "just cause," and in providing a remedy, the courts should not entertain claims of the losing party that the arbitrator has not made the appropriate judgment on the public policy issue unless the remedy prescribed by the arbitrator would require a violation of law. The arbitrator's decision is, as it were, read into the agreement as if it were set out in the agreement in so many words. A court should not refuse to enforce the agreement as so read unless enforcement would require a violation of law. The same principle may, but need not necessarily, be applied in other cases. Even in those other

cases, however, the rule announced by this Court in *W.R. Grace and Co. v. Rubber Workers Local 759*, 461 U.S. 757, 766 (1983), should control, and the expansive use of public policy represented by the decision of the court below should not be permitted.

This result is dictated by the overriding federal policy expressed in the whole structure of law which this Court has built in the interest of encouraging the use of arbitration rather than the strike as a method of resolving disputes arising during the term of a collective bargaining agreement. The rule of *Enterprise Wheel and Car* is an essential part of that structure. As this case illustrates, there is a strong temptation for courts to reach out, on one ground or another, to set aside arbitration awards that they consider wrongly decided. That temptation is resisted in most cases. But the proliferation of litigation in which the validity of an arbitrator's award is challenged shows that even the few cases in which the challenge is successful serve as beacons encouraging litigation that, in the end, can only undercut achievement of the objectives of speed, flexibility, and finality that induce employers and unions to choose arbitration rather than the strike as the terminal facility for the resolution of disputes. This court should, therefore, in the strongest terms reaffirm the principles of finality expressed in *Enterprise Wheel and Car.*

ARGUMENT

I. Whether or Not a Court May Refuse to Enforce an Arbitrator's Award for Reasons of "Public Policy," the Decision Below Must Be Reversed

There can be little doubt about the proper end result in this case. Even assuming that the question posed in the petition for certiorari—"Whether a federal court may refuse to enforce an arbitration award [not in violation of law] . . . on the ground that enforcement of the award would contravene public policy. . . ."—is answered in the

affirmative, the decision of the Court of Appeals should be reversed.

The reason is simply that the Court of Appeals, although it purported to do so, plainly failed to adhere to the principles of *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The court said that its refusal to enforce the arbitrator's award ordering reinstatement was based on a public policy concern for safety. But no such question of public policy even presented itself unless the court first invaded the arbitrator's domain and reversed both his interpretation and application of the collective bargaining agreement and his findings of fact.

The arbitrator in this case is not a lawyer and his opinion in this case may not be a model of judicial craftsmanship. But as this Court has said, there is no requirement in law that an arbitrator issue any opinion and if one is issued "a mere ambiguity in the opinion accompanying the award . . . is not a reason for refusing to enforce the award." [1] In this case there is no ambiguity. Although not in the order one might desire, and with some unnecessary dictum, the opinion does show the ultimate finding upon which the arbitrator rested his award. He found that the evidence properly before him—consisting principally of the grievant's apprehension in the rear seat of a car not his own in which a lit marijuana cigarette was in the front seat ashtray after the two occupants of that front seat had departed—was not sufficient to prove the grievant guilty of the offense for which he was discharged: smoking marijuana. The fact that an unusable amount of marijuana residue was later found in the grievant's own car, a fact which was only discovered later and first adduced by the company at the time of the hearing, the arbitrator ruled to be irrelevant.

In so ruling the arbitrator followed the usual practice in arbitration. The general rule is stated by the leading

[1] 363 U.S. at 593.

commentators on arbitration practice: "Where a discharge occurs, its propriety must be determined from an analysis of the cause for the discharge, and evidence of misconduct discovered after the discharge cannot be presented to justify the discharge action." [2] Or, as stated in Elkouri & Elkouri,[3] "Even without . . . specific contractual provision, arbitrators have held that discharge, to use the words of arbitrator Paul N. Gunthrie, 'must stand or fall upon the reason given at the time of discharge;' other reasons may not be added when the case reaches arbitration." These authors also indicate that there are circumstances in which some arbitrators have taken into account post-discharge justifications based on evidence obtained after the discharge. But clearly the arbitrator was exercising the judgment which the parties had vested in him in determining that under this collective bargaining agreement evidence of a violation of the rule in question different from the one for which the grievant was discharged should not be taken into account in determining whether the employer had just cause when it discharged him.

Even if we assume that the court properly reversed the arbitrator for what it called a "narrow focus on [the grievant's] procedural rights," there still was no public policy question. If the arbitrator should have considered the after-discovered evidence of the marijuana gleanings in the grievant's car, then he could have concluded that the grievant had technically violated the rule against bringing a controlled substance onto plant premises. But even so, that would not call into play any public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." It simply dooes not follow from the fact that there were marijuana gleanings in the grievant's car that he had operated machinery under the influence of marijuana.

---

[2] Fairweather, Practice and Procedure in Labor Arbitration (2nd ed. 1983) 303.

[3] How Arbitration Works (4th ed., 1985) 675-676.

This must have been apparent to the Court of Appeals. Perhaps the court reached the public policy question because it believed that the grievant had in fact been smoking the marijuana cigarette found in the front seat ash tray and that he therefore operated dangerous machinery under its influence. Perhaps the court believed that the grievant had supplied from his car the marijuana which his companions then smoked in the second car, thus causing *them* to operate dangerous machinery under the influence of marijuana. Perhaps it believed—as it intimated in its opinion—that sitting in a car in which others smoked marijuana caused the grievant to be under its influence.[4] Whichever is the case, the court had to invade the province of the arbitrator in order to reach the public policy issue. No safety question at all existed unless the court substituted its own beliefs, for the arbitrator's conclusions on the facts in violation of the direction of this Court in *Enterprise Wheel and Car.* As the Court there stated, it is the arbitrator's judgment which the parties have bargained for, and that judgment should be sustained unless it can be shown that the arbitrator attempted to dispense his own brand of industrial justice instead of applying the standards which he found in the collective bargaining agreement.

II. Under Agreements Providing for Review of the Imposition of Discipline on a "Just Cause" Standard the Arbitrator Is Authorized to Consider Questions of Industrial Justice

Although this case can be disposed on the foregoing basis, any such decision would not resolve the conflict of circuits that presumably led this Court to grant certiorari. We therefore now address ourselves to that question: to what extent and under what circumstances, may

---

[4] If so, the belief is contrary to the scientific evidence. See Perez-Reyes, Guiseppi, Mason and Davis, *Passive Inhalation of Marijuana Smoke and Urinary Excretion of Cannabinoids,* 34 Clinical Pharmacology and Therapeutics No. 1, p. 36 (1983).

a court set aside an arbitrator's award in a discharge case on the ground that enforcement would violate public policy? In order to do so we assume, hypothetically, that the arbitrator had properly found that the grievant had violated the company rule but nevertheless ordered his reinstatement, although there is no showing that he would have done so or, if he would, what conditions he might have placed on the reinstatement order.

Resolution of the question thus posed requires careful consideration of the respective roles of courts and arbitrators in actions subject to Section 301 of the Labor Management Relations Act of 1947. This Court in *A.T.&T. Technologies*[5] recently re-addressed one aspect of that relationship—the role of the court in determining whether an employer should be required to arbitrate a claim that the collective agreement has been violated. The question presented in this case concerns the role of the court at the end of the arbitration process when the award has been issued.

The two are closely related. In *Warrior & Gulf*[6] and *American Manufacturing*[7] this Court made it clear, and reiterated in *A.T.&T. Technologies*, that if the claim is that a party has violated the collective bargaining agreement and the arbitration provision is susceptible of a construction making a claim of violation of the agreement subject to arbitration the court should order the other party to arbitrate. It follows that when arbitration is ordered, or when the obligation to arbitrate is complied with without the necessity of an order, the arbitrator is confined to determination of the questions comprised within the agreement to arbitrate. In the typical

---

[5] *A.T.&T. Technologies v. Communications Workers*, —— U.S. ——, 106 S.Ct. 1415 (1986).

[6] *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

[7] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

case, as in the present case, those questions are whether the employer has complied with the express or implied provisions of the collective bargaining agreement and, if not, what is the appropriate remedy. As this Court restated the arbitrator's role in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974), citing *Enterprise Wheel & Car*:

> "As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the 'industrial common law of the shop' and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties . . . . If an arbitratal decision is based 'solely on the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of his submission,' and the award will not be enforced."

What is true of a decision of an arbitrator based on the requirements of enacted legislation is equally true of one based on public policy. The general rule is that an arbitrator has no authority to award relief to a grievant that is not expressly or impliedly required by the collective agreement because the arbitrator believes it to be required by public policy or, on the other hand, to deny relief which he finds that the agreement mandates because of considerations of public policy. In so doing the arbitrator would be "dispensing his own brand of industrial justice."

As with all general rules, however, there are exceptions. The collective agreement may itself require the arbitrator to consider and decide "the requirements of enacted legislation." A typical example is an agreement provision that the employer will accord to returning servicemen all of the seniority rights specified in the ap-

plicable service legislation.[8] Another is a provision that the employer will abide by the nondiscrimination provisions of Title VII of the Civil Rights Act.[9]

The collective agreement may also, either expressly or impliedly, authorize the arbitrator to deal with questions of industrial justice. And, indeed, most agreements in fact do so in connection with discipline and discharge cases. Even those agreements that do specify grounds for discipline or discharge, either in the agreement itself or in rules which the agreement authorizes the employer to promulgate, rarely provide for automatic and uniform penalties. There are agreements that do. Some agreements, for example, provide for graduated penalties for specific numbers of unexcused absences or garnishments with discharge as the final and automatic penalty for a specified number in a given period.[10] Similarly, an agreement may provide that engaging in a strike in violation of the agreement is ground for discharge and that, if the penalty is contested, the arbitrator may only consider whether the disciplined employee in fact engaged in the prohibited conduct.[11]

The usual agreement, however, does not so provide but rather specifies that an employee may be discharged only for "just cause," or "proper cause" or "sufficient cause." And it is just in such cases that the conflict in the circuits which brought this case to the Court has arisen. The precise question upon which the courts of appeals have differed is whether, and under what circumstances,

---

[8] Agreement between United States Steel Corp. and Steelworkers, Section 15A (exp. 8/86) reprinted in BNA, Collective Bargaining Negotiations and Contracts (hereinafter CBNC) 27:48.

[9] See the provisions reported in CBNC 95:482.

[10] See the provisions reported in CBNC 40:13 and 40:203.

[11] Agreement between Litton Industrial Products, Inc. and Machinists (exp. 6/83) reported in CBNC 77:277.

a court can refuse to enforce an arbitrator's decision that a discharge was not for "just cause" on the ground that the decision is contrary to public policy. More detailed analysis of the arbitrator's function in discharge cases is, we believe, the necessary predicate for resolution of that question.

As former dean Sanford Kadish argued in an address to the Academy in 1964, the issues in a disciplinary case are roughly analogous to those posed in criminal trials.[12] The first issue is whether there is satisfactory proof that the disciplined employee committed the offense for which he was discharged. This is a factual question on which arbitrators unanimously take the position that the employer has the burden of proof, although they differ as to the weight of that burden. In some cases arbitrators have said that proof in the case of a discharge must be beyond reasonable doubt, in others the standard is stated to be clear and convincing proof, in yet others it is said to be preponderance of the evidence.[13] In any event, if the arbitrator finds, on whatever basis, that the employer has not met its burden of proof, the discharge or discipline must be set aside and the employee made whole.

Once the arbitrator finds that the employee committed the offense for which he was disciplined, there are additional issues. Since the arbitrator's jurisdiction is that prescribed by the agreement, he must next decide whether the agreement, either explicitly or as consistently construed by the parties, provides a mandatory penalty or

---

[12] Kadish, *The Criminal Law and Industrial Discipline As Sanctioning Systems*, in Labor Arbitration Perspectives and Problems, Proceedings of the Seventeenth Annual Meeting, National Academy of Arbitrators (1964) 125.

[13] See Jennings, Sheffield and Walters, *The Arbitration of Discharge Cases: A Forty-Year Perspective*, 38 Lab.L.J. 33, 39-40 (1987).

that the employer's determination as to penalty is unreviewable.[14] If so, the case is ended. But in the usual case, as in this case, the agreement provides that the employer's power to discipline or discharge may be exercised only for "just," or "proper" or "sufficient" cause.

The arbitrator's function under such an agreement was described in a decision 40 years ago by Harry Platt, an arbitrator who subsequently became president of the National Academy, in these words:

> "It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires "sufficient cause" as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrongdoing and, if so, to confirm the employer's right to discipline where its exercise is essential to the objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge. To be sure, no standards exist to aid an Arbitrator in finding a conclusive answer to such a question and therefore, perhaps the best he can do is to decide what a reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just." [15]

---

[14] Although unnecessary to his ultimate decision that the grievant did not commit the offense charged, the arbitrator in this case addressed this question in his opinion. Referring to it as a question of whether Rule II.1 called for "immediate discharge" he concluded that it did not since that rule was included without differentiation with a rule prohibiting reading on duty, clearly not one requiring mandatory discharge. App.Pet.Cert. 45a.

[15] *Riley Stoker Corp.*, 7 LA 764, 767 (H. Platt, 1947).

In addressing these questions, the arbitrator is, of course, not making the initial determination. That right is given to the employer. The arbitrator's function is to decide whether in exercising that right the employer has satisfied the contractual standard. If the arbitrator determines that it has, the case is ended. If he determines that the employer has not, there remain further issues. The agreement may provide that the arbitrator has no authority to modify the discipline imposed. In that event the arbitrator cannot substitute his determination as to the appropriate punishment.[16] In the more usual case, however, the arbitrator is empowered to reduce the penalty if he concludes that the one imposed by the employer does not meet the contractual standard of justice or sufficiency. And that raises the third and final question: the appropriate remedy. Here again the factors described by arbitrator Platt are relevant. If the arbitrator determines that a discharge does not meet the standard of justice or sufficiency, he may reduce the penalty to a suspension for a specified number of days or order reinstatement without back pay, thus in effect imposing a suspension equal to the time elapsed between the discharge and the date of reinstatement, or impose conditions on reinstatement.

Thus in *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983), the arbitrator's award that the court set aside had ordered in 1977 reinstatement without back pay of a truck driver who had been discharged in 1975, thus imposing a two year suspension without pay. In *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984), the arbitrator ordered reinstatement of a window clerk who had confessed to embezzlement and had been given probation by the court and ordered to make restitution. The reinstatement directed, however, was without

---

[16] Agreement between United States Steel Corp. and Steelworkers, Section 8-D (exp. 8/86) reprinted in CBNC 27:16.

back pay and not to the grievant's former position but, rather, to one where "similar action" to that which had occurred "could not take place," with the additional condition that deductions be made from his pay to accomplish the restitution.

III. In Determining Whether Standards of Industrial Justice Have Been Met, Arbitrators Are Authorized to and Do Decide Questions of Public Policy and, in Particular, Public Policies Relating to Safety

Unless constrained by other provisions of the collective agreement an arbitrator who is directed by the parties to consider whether the discipline imposed by the employer is "just," or "proper" or "sufficient" necessarily must take into account any public policy relating to the justice of the discipline. As another past president of the Academy, Professor Edgar A. Jones, Jr. put it in an address to the Academy, considerations of justice create a "necessity for an arbitrator to assess 'the common stock of legal ideas' about what is tolerable in our society." [17] This is particularly true of the public policy issue presented in this case: safety.

A review of all published arbitrators' decisions conducted by Professor Alfred Blumrosen more than 25 years ago under the title "Public Policy Considerations in Labor Arbitration Cases" [18] demonstrated what clearly remains true today: arbitrators consider it their duty to take account of public policy considerations in determining "just cause." He found that arbitrators "handle public policy considerations with understanding and intelligence." [19] And a sampling of recent decisions dealing

---

[17] Jones, *The Role of Arbitration in State and National Labor Policy*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators 42, 53 (1971).

[18] Blumrosen, *Public Policy Considerations in Labor Arbitration Cases*, 14 Rutgers L.Rev. 217 (1960).

[19] *Id.* at 263.

with safety considerations where drug or alcohol abuse is alleged underlines his conclusion.

For example, in *Asarco, Inc.*, 76 LA 162 (H.H. Grooms, 1981), the arbitrator sustained the discharge of an employee because he entered the mine under the influence of alcohol, saying:

> "This arbitrator has no little appreciation of the risks attendant to underground mining, having decided over a hundred arbitrations arising out of that field. He has been to the face of a coal mine, 3,000 feet below the surface. He has observed miners carrying out their customary tasks. While he has not been down in a zinc sulfide mine, he cannot conceive of it being as safe as a package terminal, a warehouse, or an assemblyline. . . . It is a place where safety must continually be foremost in each employee's mind. It is a place where even a brief omission of basic mine safety can lead to serious injury or death not only of the employee involved but very likely others in the area." 76 LA at 165.

In *Cities Service Co.*, 77 LA 1180 (C.C. Brisco, 1982), another case of a discharge for reporting to work under the influence of alcohol, the arbitrator sustained the discharge, saying:

> ". . . . The Company's ore processing facility with its open tanks, moving machinery and metal grating walkways and stairs is full of hazards, especially for a person who is not fully in command of all of her faculties. There are ample reasons for enforcing a stringent rule against reporting for work under the influence of intoxicating liquor." 77 LA at 1184.

This is particularly true where the employment of the discharged employee required him to operate vehicles or otherwise create a hazard for the public. Thus in *Indianapolis Power and Light Co.*, 87 LA 826 (M.M. Volz, 1986), the arbitrator in sustaining the discharge of an employee for the use of drugs off the job, said:

> "In passing on the severity of the discharge penalty imposed, we observe that the Company is a public utility, the actions of which are under careful scrutiny by the public and by the regulatory agencies. The obligations to conduct safe operations and to have safety-minded employees are contractually imposed and cannot be compromised. Here the grievant did work with and in the vicinity of other employees; he operated Company vehicles, sometimes on public roads; he had notice of the Company's anti-drug policy and that the possible penalty could be termination." 87 LA at 830.

Again, in *Consolidation Coal, Co.* 87 LA 729 (R.Hon, 1986), the arbitrator sustained the discharge of an employee found to be working under the influence of drugs, saying:

> "possession and/or use of illegal drugs is generally regarded as an offense which constitutes such an 'industrial felony.' This is particularly true in the mining industry, where the operation of heavy machinery compounds the inherent hazards of the job. Working under such conditions requires full physical and mental capacity at all times to a higher degree than jobs with lesser safety considerations. . . . To condone grievant's actions in any way could lead other employees to believe that they can violate such a fundamental conduct rule, endanger the safety of other employees, and still retain their jobs. A coal mine, with its inherent dangers and hazards, is not a place where such conduct can be countenanced." 87 LA at 737.

Arbitral consideration of public policy in determining whether "just cause" for discharge exists is not confined to conduct on the plant premises. Although arbitrators will generally not sustain discipline based on conduct unconnected with a grievant's work, they do sustain discharges where off-duty conduct prevents the employer from fulfilling its public responsibilities. Thus, conviction of an employee of drug dealing totally unconnected

with the work place has been found to constitute "just cause" for discharge because of its effect on the employer's credibility in its effort to combat drug use in the workplace in the interests of safety.[20] Even in the absence of a criminal conviction a discharge has been sustained as just on the basis that a publicized arrest for possession of cocaine off the employer's premises would adversely affect the employee's ability to perform a public function.[21]

To be sure, arbitrators do not sustain discharges as "just" in every case in which the use of drugs or alcohol in violation of a management rule is found, even where there are serious safety considerations. Safety is not the only public policy consideration which an arbitrator may take into account in determining whether the standard of "just cause" has been met. Society has an interest in rehabilitation, an interest in preserving the opportunity of employees who have erred to continue as useful members of the working force, an interest in not relegating to the scrap heap those who have served long and well. These interests are particularly strong in a society where drug and alcohol dependence problems have become widespread. In recognition of this interest as well as of their own, many employers have established what have come to be called generically Employee Assistance Programs to deal with drug and alcohol abuse.[22] Indeed, the largest employer in the country, the government of the United States, has recently mandated the adoption of such programs. See Executive Order 12564, 51 F.Reg. 32839 (September 15, 1986), requiring each executive agency to establish a program emphasizing, among other things, "counseling, referral to rehabilitation, and coordination with available community resources."

---

[20] *Lanter Co.*, 87 LA 1300 (J.R. Thornell, 1987).

[21] *Wayne State University*, 87 LA 953 (M. Lipson, 1986).

[22] The various approaches to drug and alcohol abuse problems are discussed in T.S. Denenberg and R.V. Denenberg, Alcohol and Drugs: Issues in the Work Place (1983).

Where such programs exist and the discharged employee has not been afforded an opportunity to participate, arbitrators may set aside discharges and direct the employer to make the services of the program available to the employee.[23] Even where there are no such programs, many arbitrators will, depending on the employee's record and his willingness to undertake rehabilitation, direct reinstatement following completion of a rehabilitation program on condition that the employee subject himself to appropriate testing to show that he is free of the offending substance.[24] In other situations, where there is no indication that the discharged employee will repeat the offense and his prior record is clean, arbitrators may order immediate reinstatement but on a probationary basis subject to automatic discharge for a second offense.[25] What arbitrators do in these situations is analogous to the function courts perform in determining whether a convicted offender shall be sent to prison or be put on probation subject to conditions designed to minimize potential dangers to the public.

To sum up, in discharge cases subject to a "just cause" provision the arbitrator's function is to determine whether, given all of the facts and circumstances which he finds in the case before him, there was just cause for the employer to impose the discipline involved and, if he finds that there was not, to order an appropriate remedy. In cases based on the use of drugs or alcohol consideration of both questions may involve consideration of whether there is a rehabilitation program, whether the employee has agreed to enter it or has been denied use of it,

---

[23] See *Armstrong Rubber Co.*, 77 LA 775 (A.M. Koven, 1981); *Springfield Mass Transit District*, 80 LA 193 (V. Gunther, 1983); *Washington Metropolitan Area Transit Authority*, 82 LA 150 (H.N. Bernhardt, 1983).

[24] *Atchison, Topeka & Santa Fe Ry. Co.*, 87 LA 972 (J.R. Johnson, 1986); *Morgan Adhesives*, 87 LA 1039 (R.I. Abrams, 1986).

[25] *Signal Delivery Service, Inc.*, 86 LA 75 (E.M. Weis, 1985).

whether, on the evidence, there is any indication that the employee will repeat the offense and, finally, the hazard to the discharged employee, other employees, the employer or the public created by the employee's conduct. All of these factors arbitrators can and do take into consideration, in varying degrees, depending upon the particular circumstances. The parties have assigned that function to the arbitrator and have agreed that, as the chosen proctor of the bargain, his decision shall be final.

IV. A Court Should Not Set Aside an Arbitrator's Decision as to the Justice of Discipline on Public Policy Grounds Unless the Remedy Prescribed by the Arbitrator Would Require a Violation of Law

It is with this understanding of the arbitrator's function in disciplinary cases subject to a "just cause" standard that we now address the question of whether, and under what standards, a court should set aside awards in such cases in suits subject to Section 301.

We begin by restating the obvious. As former Dean St. Antoine has put it, "The arbitrator is the parties' officially designated 'reader' of the contract." [26] "The arbitrator's award should be treated as though it were a written stipulation by the parties setting forth their own definitive construction of the labor contract." [27] Thus, when an arbitrator decides that an employee's discharge for violating a rule was not for "just cause" and orders reinstatement, with or without back pay and with or without conditions, it is just as if the parties had agreed in so many words that on the particular facts this was the prescribed remedy. It follows that a court asked to set aside the award should do so only if it finds that an

---

[26] St, Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progency*, in Arbitration—1977, Proceedings of the Thirtieth Annual Meeting, National Academy of Arbitrators 29, 30 (1978).

[27] *Ibid.*

agreement prescribing that remedy is an unenforceable one.

If the parties' agreement, as so read, requires action that would violate a federal or state statute or regulation it is obviously uneforceable. In some cases a dispute as to whether the relief requested would violate the law is presented to the arbitrator. Some arbitrators will resolve the dispute on the theory that the agreement should be deemed to include all applicable law. Others will refuse to do so.[28]

No matter which way the arbitrator resolves this question, however, it remains clear that in an action to enforce or set aside his award, a court should set it aside if it concludes that the remedy the arbitrator has ordered for the agreement violation would contravene a valid law or regulation. See *Evans Products Co. v. Millmen's Union No. 550*, 159 Cal.App.3d 815, 205 Cal.Rptr. 731 (1984) refusing enforcement of *Evans Products, Co.*, 70 LA 526 (D. Feller, 1978). Sometimes courts have referred to the role of the courts in such cases in terms of "public policy." Most of the decisions refusing to enforce, or vacating, arbitrators' awards, however, were not discharge cases but involved awards which required affirmative action in violation of statutory limitations.[29] But even an award

---

[28] The proper course of action for an arbitrator in such a situation has been the subject of much controversy at the meetings of the National Academy and has been termed the Meltzer-Howlett controversy. The controversy and the arbitration decisions in which there was a conflict between external law and the agreement are reviewed in Feller, *The Impact of External Law*, in The Future of Labor Arbitration in America 83, 90 ff. (1976).

[29] See, e.g., *General Warehousemen v. Standard Brands*, 579 F.2d 1282 (5th Cir., 1978), *cert. den.*, 441 U.S. 957 (1979) (award required employer to give to employees displaced from one plant

of reinstatement under a "just cause" provision cannot stand if there is a statutory bar to employment, as in *American Postal Workers v. United States Postal Service*, 682 F.2d 1280 (9th Cir. 1982) (re-employment of one who strikes against the government prohibited by 5 U.S.C. § 7311). Except in such cases an award finding a lack of just cause for discharge should not be set aside on public policy grounds.

This is particularly clear where the public policy invoked is safety. This issue has already been decided by this Court although in the converse situation: where it is the union that relies on the safety issue to avoid compliance with an arbitral determination.

In *Gateway Coal Co. v. United Mineworkers*, 414 U.S. 368 (1974), the issue was whether a strike by miners during the term of an agreement to protest alleged unsafe conditions could be enjoined. The district court had enjoined the strike and ordered immediate arbitration of the miners' safety complaint. The arbitrator decided that their claim of hazard was without merit. As the case came to the Court of Appeals for the Third Circuit the issue was whether the injunction should be continued

---

superseniority at another plant where a different union was the certified bargaining agent, in violation of the National Labor Relations Act); *Botany Industries v. N.Y. Joint Board*, 375 F.Supp. 485 (S.D.N.Y. 1974) (award required employer to violate Section 8(e) of the National Labor Relations Act).

A court may properly set aside an award in the converse case—where the contract, as the arbitrator reads it, requires employees to violate the law. Thus, in *Teamsters Local 249 v. Consolidated Freightways*, 464 F.Supp. 2699 (W.D.Pa. 1979), the collective agreement as read by a joint management-union committee required truck drivers to obey orders to drive trucks in violation of the Pennsylvania Motor Vehicle Code. The District Court quite properly set aside the committee decision, which it termed an "arbitration" award.

after the arbitator had so ruled. That court ordered vacation of the injunction against the strike, saying:

> "Considerations of economic peace that favor arbitration of ordinary disputes have little weight here. Men are not wont to submit matters of life or death to arbitration and no enlightened society encourages, much less requires, them to do so. If employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be. The arbitrator is not staking his life on his impartial decision. It should not be the policy of the law to force the employees to stake theirs on his judgment." *Gateway Coal Co. v. United Mine Workers*, 466 F.2d 1157, 1160 (3d Cir. 1972).

This Court reversed, quoting extensively from *Warrior & Gulf* to the effect that the labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment. The Court concluded:

> "We think these remarks are as applicable to labor disputes touching the safety of the employees as to other varieties of disagreement. . . . The Court of Appeals majority feared that an arbitrator might be too grudging in his appreciation of the workers' interest in their own safety. We see little justification for the Court's assumption, especially since the parties are always free to choose an arbitrator whose knowledge and judgment they trust." 368 U.S. at 379.

These considerations are equally applicable where it is the employer rather than the union that resists the arbitrator's conclusion on the basis of the public's interest in safety.

In every case involving an arbitration award ordering reinstatement, as in this case, or enjoining a strike over safety issues, as in *Gateway Coal*, the party seeking to avoid the arbitrator's decision is not acting as a disinterested representative of the public. Public policy is being invoked in the private interest of the party in an effort to avoid the binding effect of a decision adverse to it on the safety issue. Whether the private party be the union or the employer, it should be bound by the arbitrator's decision if it has been stipulated that his decision shall be final and binding, as it has been in this case and in *Gateway Coal.*

That principle should apply not only where the public policy urged as the ground for vacating an arbitrator's decision is safety but in any case in which the arbitrator is given the authority to determine whether there is "just cause" for discharge. By vesting in the arbitrator the power to determine the justice of the discipline, and the appropriate remedy where justice requires it, the parties have delegated to the arbitrator the authority to determine the weight to be given to public policy, and the principles of *Enterprise Wheel & Car* require that the courts respect his determination.

In so urging we do not necessarily agree in full with the broad principle set forth in Judge Easterbrook's concurring opinion in *E.I. DuPont Co. v. Grasselli Employees Association*, 790 F.2d 611 (7th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3235 Oct., 1986). Judge Easterbrook there argued that only where a collective agreement, as read by the arbitrator, "violates a rule of law" may a court set it aside on public grounds. We need not go that far. That rule is appropriate where the arbitrator has been given authority to determine whether the punishment imposed by the employer for violating a rule is just. It may be but is not necessarily appropriate where the issue is whether the rule itself is contrary to public policy.

As we have earlier stated, an arbitrator has no authority to set aside the agreement under which he serves as contrary to public policy. His river of authority can rise no higher than its source, the collective bargaining agreement. A court may perhaps, in carefully limited cases, determine that the rule of employee conduct prescribed by the agreement is unenforceable as against public policy even though not contrary to law.[30] We offer no principle to govern such cases other than the one already enunciated by this Court in *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 766 (1983): the public policy "must be well defined and dominant, and is to be ascertained by 'reference to the laws and legal precedents and not from general considerations of supposed public interests. *Muschany v. United States*, 324 U.S. 49, 66 (1945).'" But where, as here, the question is whether an order of reinstatement based on a finding that there was not just cause for discharge should be enforced, the stricter rule urged by Judge Easterbrook is the only tolerable one.

Any other rule would lead to the possibility of results such as that reached by the Supreme Court of California in *Black v. Cutter Laboratories*, 43 Cal.2d 788 (1955), *cert. dismissed*, 352 U.S. 859 (1956). That court refused enforcement of a "just cause" order of reinstatement on what it regarded as strong public policy grounds: Com-

---

[30] A case in point is *Meat Cutters Local No. P-1236 v. Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982). The agreement there authorized the employer to promulgate a rule prohibiting employees in a meat packing plant from reporting directly to the United States Department of Agriculture inspectors. The union's challenge of the rule was rejected in arbitration. The Court of Appeals set the award aside on the ground that it violated the public policy expressed in the Meat Inspection Act, 21 U.S.C. §§ 602ff. The question in the case was not whether discipline imposed for violation of the rule was just. (In fact the only discipline was a reprimand which was later revoked by agreement.) The issue was the validity of the rule itself.

munist party membership. This Court refused to review that decision but that was before it had developed the present overriding federal policy requiring the opposite result, a subject to which we now turn.[31]

V. Federal Labor Policy Requires a Strong Re-Affirmation of the Rule of *Enterprise Wheel & Car* and the Rejection of an Expansive Public Policy Exception.

Any rule other than the one we urge with respect to the enforcement of awards would itself be contrary to the dominant federal policy supporting labor arbitration. That policy is based upon reliance on arbitration to foster industrial peace. This Court's decisions, not only in the Steelworkers Trilogy, but also in *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962), and *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970), rest on a sound understanding of the collective bargaining process and a clear vision of the role of arbitration in making that process effective.

As the Court observed in *Warrior & Gulf*, grievance arbitration is not a substitute for litigation but a substitute for the strike as a method of resolving disputes arising during the term of a collective bargaining agreement: "Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement be-

---

[31] It is somewhat curious that a potential public policy defense existed in the only other case in this Court in which enforcement of an order of reinstatement under a "just cause" provision was contested, *Enterprise Wheel & Car*. In that case reinstatement had been ordered, with some loss of pay, for employees who had engaged in a strike over an arbitrable grievance in violation of contract. The public policy against such activity is certainly a strong and well defined one based on statute, but no suggestion was made that the award was therefore unenforceable.

ing the 'quid pro quo' for the agreement not to strike." [32] That policy has been implemented not only by ordering arbitration when the parties have agreed to it and by enforcing arbitration awards. The Court has also acted to protect the employer's interest in peaceful resolution of disputes over interpretation and application of the agreement.

Thus in *Teamsters Local 174 v. Lucas Flower Co.*, it was held that a no-strike clause must be implied from a union's promise to arbitrate. When the Court became persuaded that the employer was inadequately protected by a damage action for union breach of a no-strike clause or by the self-help remedy of discharge of striking employees, it overrode the Norris-LaGuardia Act prohibition of federal court injunctions against strikers, authorizing federal district courts to enjoin breach of contract strikes over arbitrable grievances (*Boys Markets v. Retail Clerks*; see also *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976), and *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974), in which a promise not to strike was implied from a commitment to arbitrate, following *Lucas Flour*, and the implied promise was held to justify an anti-strike injunction, following *Boys Markets*). Given an agreement to arbitrate, those decisions compel the union to arbitrate and preclude strike. The union that has gained the employer's commitment to arbitration in exchange for a no-strike pledge is not to be permitted the *de facto* power to rewrite the bargain unilaterally and strike or arbitrate at its option.

Nor is the individual employee or the union permitted to bypass the grievance and arbitration procedure in order to gain the ear of a more sympathetic judge or jury, or more expansive relief than is usually available in arbitration. Except where the union breaches its duty

---

[32] 363 U.S. at 578, n.4.

of fair representation, *Vaca v. Sipes*, 386 U.S. 171 (1967), the employee is confined to the forum and to the remedies provided by the collective bargaining agreement. *Republic Steel Co. v. Maddox*, 379 U.S. 650 (1965).

The rule announced in *Enterprise Wheel and Car* is an essential part of this carefully built structure. The rule of that case, that whatever its own view of the merits, a court must enforce an arbitrator's resolution of a dispute as to the proper application of a contract, is not one that is naturally congenial to judges accustomed to exercising the ultimate power to decide what agreements mean and what consequences should follow from their breach. The temptation to correct what a court believes to be a clearly erroneous result is a strong one, particularly where, as here, the decision is made by one not skilled in the law. And so some courts, although paying lip service to the principles of *Enterprise Wheel and Car*, as the court below did, resort to other doctrines in order to make what they believe to be the required correction. Sometimes the doctrine invoked is that the arbitrator exceeded his jurisdiction because plainly wrong.[23] In other cases, as in this case, the theory is that the arbitrator's decision is contrary to public policy. In either case the result is to substantially undercut the federal policy designed to encourage the use of arbitration rather than the strike as a method of resolving disputes during the term of an agreement.

It is significant that in almost every case in which arbitration is provided as a substitute for the strike the parties stipulate that the arbitrator's award shall be final and binding. Advisory arbitration is virtually unknown in private industrial relations. What the parties seek in

---

[23] The principal cases are reviewed in Morris, *Twenty Years of Trilogy: A Celebration*, in Decisional Thinking of Arbitrators and Judges, Proceedings of Thirty-Third Annual Meeting, National Academy of Arbitrators 331, 351ff (1981).

arbitration is speed, flexibility and *finality*. The advantages of arbitration over the more traditional method of settling disputes by a work stoppage is substantially lessened if, at the end of the arbitration process, litigation must be undertaken in order to achieve the result mandated by the arbitrator. The danger is not only that, as in this case, one party or another may succeed in upsetting the arbitrator's decision. The danger is that such cases will serve as beacons inviting the parties in other cases to resist compliance with arbitrators' decisions in the hope that they too can succeed in like manner, or at least achieve substantial delay.

The number of cases in which arbitrators' awards have been set aside on public policy or other grounds is not large. But the number of cases in which it has been necessary to institute litigation to enforce arbitrators' awards or in which suit has been brought to set them aside is quite large and growing.[34] It is therefore critically important for the maintenance of the structure of law which this Court has created that the limitations on the power of a court to set aside or refuse to enforce an arbitrator's award be again set out in strong terms so that the temptation to go to court after the arbitration process has been concluded will be substantially reduced.

---

[34] In the five year period 1981-1985, there were more than 50 reported federal circuit court of appeals decisions in which the validity of an arbitrator's award was contested. In only a very few was the contest successful. See 2 Bureau of National Affairs, Labor Relations Cumulative Digest and Index 1981-1985 (1986) 2549-2571. The number of district court cases, most of which are unreported, is obviously several times greater. A similar digest of appellate decisions covering a ten-year earlier period reports less than a third of the number reported for 1981-1985. 2 Bureau of National Affairs, Labor Relations Cumulative Digest and Index 1971-1975 (1976) 1659-1667.

CONCLUSION

For the reasons stated the judgment of the Court of Appeals should be reversed and the cause remanded with directions to enforce the arbitrator's award.

Respectfully submitted,

DAVID E. FELLER *
Special Counsel
Boalt Hall
Bancroft at Piedmont
Berkeley, CA 94720
(415) 642-0629

WILLIAM P. MURPHY
President, National Academy
of Arbitrators
School of Law
University of North Carolina
Chapel Hill, North Carolina 27514
(919) 962-4124

Attorneys for the
National Academy of Arbitrators

Of Counsel:

JAN VETTER
Boalt Hall
Berkeley, CA 94720
(415) 642-0821

* Counsel of Record

No. 86-651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED PAPERWORKERS INTERNATIONAL UNION,
Petitioner,

V.

MISCO, INC.,
Respondent.

On Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF *AMICI CURIAE* NORTHWEST AIRLINES, INC., THE AIR TRANSPORT ASSOCIATION OF AMERICA, AND THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE IN SUPPORT OF RESPONDENT

PHILIP A. LACOVARA
(Counsel of Record)
WILLIAM R. STEIN
PATRICIA A. DEAN
Hughes Hubbard & Reed
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 626-6200

Attorneys for Amici Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. Neither This Court Nor The Lower Federal Courts Have Limited The "Public-Policy" Exception To Violations Of Positive Law	5
A. Evolution of the "Public-Policy" Exception	5
B. Application of the "Public-Policy" Exception in Labor Relations	9
C. Careful Judicial Application of Flexible "Public-Policy" Exception	10
II. The Standard Urged By Petitioner Would Gut *W. R. Grace,* Is Not Necessary To Protect National Labor Policy, And Would Lead To Dangerous Results	16
A. Flexible "Public-Policy" Exception Consistent with National Labor Policy	16
B. Threat to Public Interest and Public Safety from More Rigid Test	20
CONCLUSION	23

TABLE OF AUTHORITIES

	Page
CASES:	
Amalgamated Meat Cutters v. Great Western Food Co., 712 F.2d 122 (5th Cir. 1983)	11,12
American Postal Workers Union v. United States Postal Service, 789 F.2d 1 (D.C. Cir. 1986)	14,21
Bevles Co. v. Teamsters Local 986, 791 F.2d 1391 (9th Cir. 1986), *petition for cert. pending*, No. 86-431	13
Borsari v. FAA, 699 F.2d 106 (2d Cir.), *cert. denied*, 464 U.S. 833 (1983)	21
Burt v. Union Central Life Ins. Co., 187 U.S. 362 (1902)	6
Chicago, St. L. & N.O.R.R. v. Pullman Southern Car Co., 139 U.S. 79 (1891)	7,21
Crocker v. United States, 240 U.S. 74 (1916)	6
E. I. DuPont de Nemours and Co. v. Grasselli Employees Independent Ass'n, 790 F.2d 611 (7th Cir.), *cert. denied*, 107 S. Ct. 186 (1986)	13
Hazelton v. Sheckels, 202 U.S. 71 (1906)	6
Hurd v. Hodge, 334 U.S. 24 (1948)	8,20
Marshall v. Baltimore & O.R.R., 57 U.S. (16 How.) 314 (1853)	6
McMullen v. Hoffman, 174 U.S. 639 (1899)	7,17
Muschany v. United States, 324 U.S. 49 (1945)	8
National Rural Letter Carriers' Ass'n v. United States Postal Service, 625 F. Supp. 1527 (D.D.C. 1986)	13

	Page
Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 633 F. Supp. 779 (D.D.C. 1985)...	22
Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 808 F.2d 76 (D.C. Cir. 1987), *petition for cert. pending*, No. 86-1548.....	3,15,22
Pope Mfg. Co. v. Gormully, 144 U.S. 224 (1892).....	6
Premium Building Products Co. v. United Steelworkers, 616 F. Supp. 512 (N.D. Ohio), *aff'd without opinion*, 798 F.2d 1415 (6th Cir. 1985)	14
Providence Tool Co. v. Norris, 69 U.S. (2 Wall.) 45 (1865).....	6
S. D. Warren Co. v. United Paperworkers Int'l Union, 815 F.2d 178 (1st Cir. 1987).....	12
Schmidt v. Republic Airlines, Inc., 630 F. Supp. 1303 (D. Minn. 1986)	14
Service Employees Int'l Union v. Children's Hospital National Medical Center, 640 F. Supp. 272 (D.D.C. 1984).....	14
Sprott v. United States, 87 U.S. (20 Wall.) 459 (1874).....	6
Steele v. Drummond, 275 U.S. 199 (1927)..	7
Super Tire Engineering Co. v. Teamsters Local Union No. 676, 721 F.2d 121 (3d Cir. 1983), *cert. denied*, 469 U.S. 817 (1984).....	12
Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984).....	22
Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353 (1931)	9,17
United Mineworkers of America Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982).....	17

	Page
United States Postal Service v. American Postal Workers Union, 736 F.2d 822 (1st Cir. 1984)	11,12,22
United States Postal Service v. National Association of Letter Carriers, 810 F.2d 1239 (D.C. Cir. 1987) (*per curiam*)	15,21,22
United States Postal Service v. National Ass'n of Letter Carriers, ___ U.S. ___ (May 21, 1987) (No. A-820) (Rehnquist, C.J., in chambers)	15
United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)	18
Vidal v. Girard's Executors, 43 U.S. (2 How.) 127 (1844)	7,8
W. R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers, 461 U.S. 757 (1983)	*passim*
World Airways v. International Bhd. of Teamsters, 578 F.2d 800 (9th Cir. 1978).	21
Wyman-Gordon Co. v. United Steelworkers, 613 F. Supp. 626 (N.D. Ill. 1985)	14
STATUTES:	
Railway Labor Act,	
45 U.S.C. §§ 151 *et seq.*, 181 *et seq.*	2
45 U.S.C. § 184	2

No. 86-651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED PAPERWORKERS INTERNATIONAL UNION,
Petitioner,

V.

MISCO, INC.,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF *AMICI CURIAE* NORTHWEST AIRLINES, INC., THE AIR TRANSPORT ASSOCIATION OF AMERICA, AND THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

Northwest Airlines, Inc., is a United States air carrier.[1] As an air carrier, Northwest is subject to the provisions of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, 181 *et seq.* That Act requires air carriers to submit to arbitration any disputes "growing out of grievances, or out of the interpretation or application of [collectively bargained] agreements . . . ." 45 U.S.C. § 184. The Air Transport Association of America ("the ATA") is a Washington-based trade and service association of twenty-two United States airlines and two Canadian airlines. The Airline Industrial Relations Conference ("the Air Conference") is an independent, voluntary association of twenty-one United States scheduled air carriers.[2] The Air Conference was formed to facilitate the exchange of ideas and information concerning personnel and labor relations issues in the airline industry, and to represent the member carriers with respect to related legislative, judicial and administrative matters.

This case presents the issue of the proper scope and application of the so-called "public policy exception" articulated by this Court in *W. R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers,* 461

---

[1] Pursuant to Supreme Court Rule 28.1, Northwest Airlines, Inc., states that Northwest Airlines, Inc., is a wholly-owned subsidiary of NWA, Inc., which is a publicly-held company. Northwest Airlines, Inc., has no subsidiaries that are not wholly-owned. One wholly-owned subsidiary of Northwest Airlines, Inc., Compass 315 Limited, holds twenty-five percent of the shares of Gatwick Handling Limited.

[2] A list of members of the ATA and the Air Conference is included in the Appendix.

U.S. 757 (1983), to judicial deference to labor arbitration awards. Northwest and the air carrier members of the other *amici* have a vital interest in the outcome of this case. As air carriers, they are members of a limited category of employers, the essence of whose business is providing a *safe* service to the public—public transportation.

Northwest has filed a petition for a writ of certiorari seeking review of *Northwest Airlines, Inc. v. Air Line Pilots Ass'n,* 808 F.2d 76 (D.C. Cir. 1987), *petition for cert. pending,* No. 86-1548. In that case the court of appeals held that "public policy" did not permit or require a court to decline to enforce an arbitral award ordering Northwest to reinstate a pilot who, while intoxicated, acted as copilot on a Northwest passenger flight. The ATA and the Air Conference have filed an *amicus* brief in support of Northwest's petition in that case.

Amici here present the position that, at least for these employers involved in public transportation, the public interest in safety demands that federal courts have appropriate authority to refuse to enforce labor arbitration awards that direct reinstatement of employees whose on-the-job misconduct has jeopardized the safety of the public, even if there exists no express statutory prohibition on the re-employment of such employees. *Amici* submit this brief to provide the Court with the perspective on this important labor law issue of employers whose business is the safe transportation of the public and, therefore, whose employee discipline and discharge decisions are often based upon public safety considerations.

SUMMARY OF ARGUMENT

For well over a hundred years, this Court has recognized the principle that federal courts should not lend their coercive powers to the enforcement of public or private contracts that are contrary to public policy. This Court held in *W. R. Grace* that the public policy doctrine applies equally to collective bargaining agreements and, therefore, to the enforcement of arbitration awards rendered pursuant to those contracts.

Courts deny enforcement to contracts on this basis only where the public policy is clearly defined and ascertainable by reference to existing law. In applying the doctrine, courts require that the established facts demonstrate that the enforcement of the contract will tend to injure the public or harm the public interest. This method of analysis assures that the public policy rule will not be converted into a license for courts to overturn otherwise lawful contracts arbitrarily. This Court, however has *never* required that a contract or arbitral award compel the violation of positive law before it can be found to contravene public policy.

The existing public-policy rule provides ample safeguards to assure that national labor policy is not compromised by its application. Cases decided by the lower federal courts demonstrate that the rule is applied only reluctantly and only in circumstances where enforcing an arbitral award would adversely affect the public interest, and particularly public safety.

The modified public-policy standard that the petitioner urges this Court to adopt—that a contract must do more than contravene cognizable public pol-

icy; it must violate positive law before a court may refuse to enforce it—would force courts to act against federal public policies and render courts helpless to protect the public interest. There is no basis in the cases, in logic or in national labor policy that supports such a result.

ARGUMENT

I. NEITHER THIS COURT NOR THE LOWER FEDERAL COURTS HAVE LIMITED THE "PUBLIC-POLICY" EXCEPTION TO VIOLATIONS OF POSITIVE LAW.

The petitioner union asserts that an arbitration award rendered pursuant to a collective bargaining agreement must always be enforced unless the award compels the violation of "positive law." In essence, the union is asking this Court to narrow the scope of the "public policy" exception as the Court articulated it in *W. R. Grace* so that the doctrine virtually ceases to exist, at least when applied to collective bargaining agreements. In support of its argument, the union claims that the already narrow public-policy exception is careening out of control toward the destruction of almost every aspect of national labor relations policy. The union's alarm-filled cries ring hollow, however, when viewed in the context of the historical application of the public policy exception to federal court enforcement of private contracts and labor arbitration awards, both before and since this Court's decision in *W. R. Grace*.

A. Evolution of the "Public-Policy" Exception.

As early as 1874, this Court recognized that

> "The proposition that there is in many cases a public policy which forbids courts of justice

> to allow any validity to contracts because of their tendency to affect injuriously the highest public interests . . . is too well settled to admit of dispute." *Sprott v. United States,* 87 U.S. (20 Wall.) 459 (1874).

For well over a hundred years, the Court has refused to lend its enforcement power to contracts where (1) there was a dominant public policy (2) that was "violated" by the contract in question.[3]

In *Crocker v. United States,* 240 U.S. 74 (1916), for example, the Court refused enforcement of a contract between the government and a supplier because of a second, related contingent fee contract between the supplier and a government employee that resulted in the government unknowingly paying an excessive price for goods. Although the contract in *Crocker* did not violate the express terms of any federal statute, such contracts, the Court held, "are deemed inconsistent with sound morals and public policy, and therefore invalid" because of their "baneful tendency." *Id.* at 80. *See also, e.g., Marshall v. Baltimore & O.R.R.,* 57 U.S. (16 How.) 314, 334-335 (1853); *Providence Tool Co. v. Norris,* 69 U.S. (2 Wall.) 45 (1865); *Pope Mfg. Co. v. Gormully,* 144 U.S. 224, 233 (1892); *Burt v. Union Central Life Ins. Co.,* 187 U.S. 362 (1902); *Hazelton v. Sheckels,* 202 U.S. 71 (1906). This Court has long recognized that

---

[3] In *Sprott v. United States, supra,* the Court refused to require the federal government to pay Sprott for cotton that Sprott had acquired under a purchase contract with the Confederacy.

"the law will not permit individuals to oblige themselves by contract, when the thing to be done or omitted is injurious to the public." *Chicago, St. L. & N.O.R.R. v. Pullman Southern Car Co.*, 139 U.S. 79, 89 (1891).

This Court also has long recognized that particularly in private industries where the nature of the business is imbued with a public interest—such as the transportation industry—companies are subject to independent duties to act in accordance with the public interest. Contracts of such companies are subject to "a fundamental condition . . . that their provisions must not be injurious to the public." *Chicago, St. L. & N.O.R.R. v. Pullman Southern Car Co., supra,* 139 U.S. at 89-90. Thus, this Court has held that a railroad cannot "make any agreement that militates against the public convenience, or that will defeat the public objects [public convenience and safety] for which it was established." *Id.* at 90.

In adopting this principle, however, this Court recognized that application of the public-policy rule presents a difficult task that could result in federal courts voiding otherwise lawful contracts based on judges' subjective view of "public policy." Since its earliest applications of the public-policy limitation, therefore, the Court has held that it may be invoked only in limited circumstances. *See, e.g., Vidal v. Girard's Executors,* 43 U.S. (2 How.) 127 (1844); *McMullen v. Hoffman,* 174 U.S. 639 (1899); *Steele v. Drummond,* 275 U.S. 199 (1927). As it has evolved, the inquiry involves two steps: first, determining the existence of the asserted public policy, and second,

determining whether that policy is "violated" by the contract at issue. *See, e.g., W. R. Grace, supra,* 461 U.S. at 766.

On the first issue, the Court has stated that "[p]ublic policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Muschany v. United States,* 324 U.S. 49, 66 (1945). *See also, e.g., Vidal v. Girard's Executors, supra,* 43 U.S. (2 How.) at 197-98. The Court has *never* held, however, that the public policy must be found in an express statutory or judicial *prohibition* of the action required by the contract. Indeed, such a miserly requirement would virtually extinguish the public-policy rule and mandate that federal courts lend their enforcement powers to dangerous and unconscionable—but not expressly prohibited—agreements.

Instead of requiring an express statutory statement of a rule or prohibition, this Court has required only that "there must be found definite *indications in the law* of the sovereignty . . . ." *Muschany v. United States, supra,* 324 U.S. at 66 (emphasis added). Thus, in *Hurd v. Hodge,* 334 U.S. 24 (1948), for example, the Court held on public-policy grounds that a federal court could not enforce racially restrictive covenants between private parties, even though the contracts were not themselves unlawful and did not compel unlawful action. The Court found that the public policy of the United States, as gleaned from the Constitution, the Civil Rights Act, and prior decisions, prohibited federal courts from lending their coercive power to such offensive covenants.

Second, this Court has carefully outlined the kind of analysis courts must employ to determine whether a contract actually contravenes public policy. In *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353 (1931), for example, in which a company sought to void, as contrary to Arkansas public policy against monopolies, a contract with a public utility company, this Court considered (1) whether the contract "infringe[d] any statute or regulation made under the authority of the State," *id.* at 357, (2) whether the contract was "arbitrarily or unfairly imposed" upon the company seeking nonenforcement, *id.* at 358, (3) whether performance of the contract would "interfere with the proper discharge of any of [the utility's] duties as a public utility," *id.*, and (4) whether the contract "subjected the . . . company to, or tend[ed] in any manner to impose upon the public, any wrong, disadvantage or evil" that the relevant public policy was intended to avoid, *id.* Following this scrupulous analysis, the Court concluded that the contract did not contravene public policy.

B. Application of the "Public-Policy" Exception in Labor Relations.

This Court has applied the public-policy doctrine equally to labor contracts. "As with any contract . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy." *W. R. Grace, supra,* 461 U.S. at 766. Sensitive, as always, to the dangers of excessive judicial intervention in the collective bargaining process, the Court in *W. R. Grace* emphasized the need for careful judicial consideration of the same factors that must be considered with respect to other kinds of contracts.

Thus, in *W. R. Grace,* the Court considered five factors before concluding that the public policy was not undermined by the labor arbitration award at issue: (1) whether the award would require one of the parties to violate an explicit statutory, regulatory, or judicial command, 461 U.S. at 766-768, (2) whether the conflict between the enforcement of the award and the relevant public policy was the result of voluntary conduct by the party seeking nonenforcement, *id.* at 767, (3) whether the award would create an incentive for one of the parties (or anyone else) to violate the public policy, *id.* at 769-70, (4) whether enforcement of the award would be "so unfair" as itself to violate public policy, *id.* at 770, and (5) whether other important policies would be inappropriately affected by the court's action, *id.* at 771. As with other kinds of contracts, the Court did not limit application of the public-policy rule only to contracts that violate the first prong of the test—direct violation of law.

C. Careful Judicial Application of Flexible "Public-Policy" Exception.

Taking the lead from *W. R. Grace,* the lower federal courts—with the exception of the District of Columbia Circuit—have not limited the public-policy analysis to violations of specific provisions of law. Yet, contrary to petitioner's suggestions, the courts have not run roughshod over collective bargaining agreements. In the four years since this Court decided *W. R. Grace,* for example, in only four cases have courts of appeals held under the existing public-policy rule that arbitral awards should not be enforced. The present case is one of them. In all those cases, the courts of appeals faithfully and carefully applied the *W. R. Grace* analysis.

In *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983), the court refused enforcement of an arbitral award that ordered a trucking company to reinstate a driver who had admitted, following an accident, that he had been drinking liquor shortly before the accident. The court found that "[a] driver who imbibes the spirits endangers not only his own life, but the health and safety of all other drivers." *Id.* at 124. The public safety considerations, the court found, "become even more compelling when the driver is regularly employed to course the highways in a massive tractor-trailer rig." *Id.* The court determined that there was a "well defined and definite" public policy against drinking and driving embodied in federal case law and Federal Motor Carrier Safety Regulations. *Id.* at 125 *quoting W. R. Grace, supra,* 461 U.S. at 766.

In *United States Postal Service v. American Postal Workers Union,* 736 F.2d 822 (1st Cir. 1984), the court refused to enforce an award reinstating a postal clerk who admitted to embezzling federal postal funds. The court there expressly rejected the argument that public policy could not bar enforcement of an arbitral award unless the award violated positive law. *Id.* at 824. The court found that, as a postal worker, the employee was "imbued with the public trust," and that he had "violated that trust" because his offense "went to the heart of [his] responsibilities." *Id.* at 825. The court found that the public policy that barred court enforcement of the award was embodied in the federal statutes making criminal the embezzlement of postal funds, and in the Postal Service's statutory duty to be prompt, reliable and efficient. *Id.*

More recently, in *S. D. Warren Co. v. United Paperworkers Int'l Union,* 815 F.2d 178 (1st Cir. 1987), on facts very similar to the present case, the court refused to enforce an award reinstating three employees who had been discharged for on-the-job use and sale of illegal drugs. The court concluded that reinstatement would contravene the "well-defined public policy against the use of drugs in the workplace." *Id.* at 186.

In *Amalgamated Meat Cutters,* the First Circuit *Postal Workers* case, and *S. D. Warren,* the courts found that, by the very on-the-job misconduct that had triggered their discharge, the employees had breached duties (1) that they and their employers owed to the public as a matter of law, and (2) that were essential to the employees' position of public trust. By contrast, in cases where the courts of appeals enforced reinstatment awards challenged as violating public policy—again, with the exception of the D.C. Circuit—the employees' misconduct had not breached such work-related duties to the public.[4] The cases

[4] Thus, in *Super Tire Engineering Co. v. Teamsters Local Union No. 676,* 721 F.2d 121 (3d Cir. 1983), *cert. denied,* 469 U.S. 817 (1984), the court ordered enforcement of an arbitral award reinstating an employee with no safety responsibilities who had been discharged for drinking alcoholic beverages during working hours. That court, citing *Amalgamated Meat Cutters, supra,* with approval, held that the employees' "reinstatement conflicts with no law or well-defined policy . . ." and noted that "[t]here was no evidence that [the employee] poses a threat to fellow workers or society." 721 F.2d at 125 n.6.

(Footnote Continued on Next Page)

decided by the district courts reveal similar results.[5]

The sole exception to the otherwise common and consistent application of the existing public-policy rule under *W. R. Grace* is the District of Columbia Circuit, which has expressly adopted the standard that the union in the present case proposes: the arbitral award must violate positive law before public policy bars its enforcement.

(Footnote Continued from Previous Page)

Similarly, in *E. I. DuPont de Nemours and Co. v. Grasselli Employees Independent Ass'n,* 790 F.2d 611 (7th Cir.), *cert. denied,* 107 S. Ct. 186 (1986), the court enforced an arbitral award ordering reinstatement of an employee discharged after he had suffered a mental breakdown at the company plant and, as a result, had assaulted other employees and destroyed company property. The court, however, expressly rejected the standard urged by the union—that the arbitral award must violate positive law before public policy will bar its enforcement. *Id.* at 616. In *Bevles Co. v. Teamsters Local 986,* 791 F.2d 1391 (9th Cir. 1986), *petition for cert. pending,* No. 86-431, the court enforced an abitral award ordering reinstatement of employees who had been discharged for being illegal aliens. The court held that federal immigration law did not establish a clearly defined public policy that would be undermined by the reinstatement award. In *E. I. DuPont* and *Bevles,* the employees' "misconduct" did not go to the heart of their employment responsibilities and did not involve a breach of a public duty.

[5] *See, e.g., National Rural Letter Carriers' Ass'n v. United States Postal Service,* 625 F. Supp. 1527 (D.D.C. 1986) (court enforced an award reinstating a letter carrier whose discharge stemmed from *off-duty* "misconduct"—his indictment for aggravated criminal sexual abuse of a minor—because no

(Footnote Continued on Next Page)

In *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986), the court enforced an arbitral award ordering the reinstatement of a postal window clerk who, like the clerk in the First Circuit *Postal Workers* case, had admittedly embezzled postal funds. The court thus transformed the well-established rule that federal courts may not enforce contracts that are "contrary to public policy" into a more crimped rule that "courts will not enforce an arbitration award if the award itself violated established law or seeks to compel some unlawful action." *Id.* at 8. Ignoring all precedent on the public-policy rule, the court asserted that "the

---

(Footnote Continued from Previous Page)

clearly-defined public policy at issue); *Schmidt v. Republic Airlines*, 630 F. Supp. 1303 (D. Minn. 1986) (maintenance supervisor discharged following indictment for perjury, but not drug-related offense, during grand jury investigation of drug trafficking and for falsifying sick leave records; court found that policy against drug trafficking was not undermined by award); *Wyman-Gordon Co. v. United Steelworkers*, 613 F. Supp. 626 (N.D. Ill. 1985) (employee discharged for collecting unemployment benefits while employed; court found public policy not undermined by arbitral award); *Premium Building Products Co. v. United Steelworkers*, 616 F. Supp. 512 (N.D. Ohio), *aff'd without opinion*, 798 F.2d 1415 (6th Cir. 1985) (employee discharged for on-duty use of marijuana; court found policy against drug use was not undermined by reinstatement award because no safety or judgment concerns involved); *Service Employees Int'l Union v. Children's Hospital National Medical Center*, 640 F. Supp. 272 (D.D.C. 1984) (unit clerk discharged for losing temper and "laying hands" on a patient after patient made disparaging remarks about employee's race; court found no clearly-defined public policy at issue and policy against assault and battery was not undermined by award).

exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards . . . ." *Id. Accord United States Postal Service v. National Ass'n of Letter Carriers,* 810 F.2d 1239 (D.C. Cir. 1987) (*per curiam*) (court enforced arbitral award reinstating letter carrier who diverted and failed to deliver over 3,500 copies of mail, most of it first class, and some of it containing U.S. Treasury checks).[6]

In another case, *Northwest Airlines, Inc. v. Air Line Pilots Ass'n,* 808 F.2d 76 (D.C. Cir. 1987), *petition for cert. pending,* No. 86-1548, the court, following the same principles, enforced an arbitral award ordering reinstatement of an airline pilot who, while intoxicated, had acted as co-pilot of a commercial passenger jet. The anomalous results of those cases—to return to positions of public trust employees whose on-the-job misconduct violated their express duties to act in the public interest or to protect public safety—cannot be squared with the purpose of the public-policy rule nor supported by any component of national labor policy.

---

[6] The Solicitor General intends to petition for a writ of certiorari to review the District of Columbia Circuit's decision in that case and to urge rejection of that Circuit's standard. *See United States Postal Service v. National Ass'n of Letter Carriers,* ____ U.S. ____ (May 21, 1987) (No. A-820) (Rehnquist, C.J., in chambers, granting stay of mandate pending the filing and disposition of certiorari petition).

II. THE STANDARD URGED BY PETITIONER WOULD GUT *W. R. GRACE*, IS NOT NECESSARY TO PROTECT NATIONAL LABOR POLICY, AND WOULD LEAD TO DANGEROUS RESULTS.

A. Flexible "Public-Policy" Exception Consistent with National Labor Policy.

The petitioner union argues that national labor policy will be irreparably harmed unless this Court adopts the District of Columbia Circuit's standard limiting the public policy exception to cases where the arbitration award compels the violation of "positive law," presumably a statute or regulation. The union, without saying so, is asking the Court to overrule *W. R. Grace*. To be sure, the Court in *W. R. Grace* considered whether the arbitral award in question violated positive law—an explicit statutory, regulatory, or judicial command. 461 U.S. 766-68. But the Court considered four other factors as well, *see* pp. 9-10, *supra*, factors which the union would have the Court now repudiate.

As we have demonstrated, however, the public-policy rule was *not* designed for application only to labor contracts and is not as narrow as the District of Columbia Circuit apparently would like. The decisions rendered after *W. R. Grace* graphically demonstrate, first, that there has been no stampede to the courthouse by employers seeking to overturn arbitral reinstatement awards and, second, that federal courts have faithfully applied the existing public-policy rule. There is simply no justification for altering a rule of judicial restraint that the courts have consistently

"applied with caution and only in cases plainly within the reasons on which that doctrine rests." *Twin City Pipe Line Co. v. Harding Glass Co., supra,* 283 U.S. at 356-57.

The union looks for support in *United Mineworkers of America Health & Retirement Funds v. Robinson,* 455 U.S. 562 (1982), a case concerning an entirely different issue. The union argues that "nothing in the national labor policy requires a court to enforce a contract which 'violates any command of Congress . . . .'" (Pet. Br. at 16; *quoting Robinson,* 455 U.S. at 576). The union, however, fails to note that the Court's opinion in the *Robinson* case was broader than that. The Court held that "as long as [specific provisions of the labor contract] do not violate federal law *or policy,* they are entitled to the same respect as any other provision in a collective bargaining agreement." *Id.* at 575 (emphasis added). Thus, *Robinson* is consistent with *W. R. Grace*: federal courts may not enforce labor contracts that violate federal positive law *or* federal policy. There is no basis in this Court's opinions for the union's crimped view of the "public-policy" exception.

The union also claims that, unless the doctrine were so limited, the public-policy rule would permit courts "to refuse to enforce *lawful* collective bargaining agreements" (Pet. Br. at 15, emphasis in original), thus undermining federal policy favoring labor contracts. That assertion begs the question. Like other contracts, collective bargaining agreements that are contrary to public policy "are illegal in their nature and tendency . . . ." *McMullen v. Hoffman, supra,* 174 U.S. at 649. The lawfulness or validity of the contract

is the precise question that the courts answer when they apply the public-policy exception.

Moreover, there is nothing behind the union's cries that a court's refusal on public-policy grounds to enforce a collective bargaining agreement results in "a regime in which the employer exercises absolute and unlimited power" and "unfettered discretion." (Pet. Br. at 15). A court may only refuse to enforce an arbitral award when *the court* finds that the "contract as interpreted" by the arbitrator "violates some explicit public policy" and that the policy is "well defined and dominant." *W. R. Grace, supra,* 461 U.S. at 766.

Judicial determination that a dominant public policy exists guarantees not only that national labor policy will be given due deference but also that employers cannot decline to comply with arbitral awards based on their unilateral view that some abstract public policy prevents them from doing so.

The union also argues that, if the judiciary is free "to invoke public policy to refuse to enforce arbitral awards which do not violate positive law," then the policy favoring arbitration would be disserved. (Pet. Br. at 20). It is difficult to understand—and the union does not explain—how the policy favoring labor arbitration is not equally "disserved" by the well-established rule that when the arbitrator's decision manifests an "infidelity" to his duty to render an award that draws its essence from the labor contract, "courts have no choice but to refuse enforcement of the award." *United Steelworkers v. Enterprise Wheel and Car Corp.,* 363 U.S. 593, 597 (1960). That judicial

determination, no less than the public-policy determination, would make it "all too easy for the courts . . . to second-guess arbitrators concerning their factual findings and contract interpretations" (Pet. Br. at 21)—unless the courts exercise restraint in making those determinations. But they do. The opinions of the federal courts that have decided the public-policy issue in the labor contract context demonstrate that the courts do *not* "second-guess" arbitrators or annul their decrees cavalierly.

The union asserts that adoption of the District of Columbia Circuit's standard would best serve national labor policy because it would leave Congress and the states free to regulate the employment relationships—for example, "to proscribe the employment of certain categories of persons or to establish licensing or other prerequisities for certain jobs." (Pet. Br. at 24). Congress and the states are, of course, free to take such action now or at any time. Applying the existing public-policy rule to collective bargaining agreements will not in any way restrict that legislative power.

To the contrary, the union's proposed standard would *require* that legislatures enact express prohibitions against reinstatement of reckless employees to positions of public trust in order to protect the public interest. Under the existing rule, however, a clearly defined and dominant public policy, ascertainable from existing law, already prohibits federal courts from enforcing such reinstatement orders. The existing public-policy rule, as the history of the application of the rule demonstrates, strikes the right balance to protect the rights of employees, the rights of employers, and the rights of the public.

B. Threat to Public Interest and Public Safety from More Rigid Test.

The union's position would lead to anomalous and dangerous results. In the present case, for example, adoption of the union's position would forbid a court the power to prevent a labor arbitrator from forcing an employer to reinstate an employee who has endangered himself and his co-workers. In support of that result, the union argues that the public policy against the use of illegal drugs or other intoxicants by operators of dangerous machinery would not be furthered by the court's refusal to enforce the arbitral reinstatement award, because that irresponsible employee, if discharged, might simply operate dangerous machinery for some other employer. It is far from certain, however, whether another employer would hire that employee for such a position. Moreover, the union misses the point of the public-policy exception. The issue is whether a federal court should use *its* coercive power to require Misco to reinstate an irresponsible employee, who has already shown his disregard for his own physical safety and the safety of others, to a position a trust. It is already well established that, absent an express statutory prohibition, private parties may *agree* to take reprehensible action. *See, e.g., Hurd v. Hodge, supra,* 334 U.S. at 31. Entirely different considerations govern whether a federal court should enforce such agreements. *Id.* at 34.

Apart from the facts of this case, however, the union's suggested approach would force federal courts to act against federal public policy and would render the courts helpless to protect the public interest in the

few situations where an arbitral award seriously jeopardizes the public interest or safety. In the area of public transportation, for example—where an employer has an obligation not to make agreements "that will defeat the public objects for which it was established," *Pullman Southern, supra,* 139 U.S. at 90—employers must act primarily to assure the safety of the travelling public. Yet the District of Columbia Circuit's standard actually allows arbitrators to second-guess the safety decisions and policies that federal law requires common carriers to make. As already applied, this standard led the court to order an airline to put back into the cockpit a pilot who flew while intoxicated, despite the fact that the airline determined, in the exercise of its federal statutory duty to promote the "highest degree of safety" in air transportation, that discharge is the proper penalty for such conduct. *See Northwest Airlines, Inc. v. Air Line Pilots Ass'n, supra; compare World Airways v. International Bhd. of Teamsters,* 578 F.2d 800 (9th Cir. 1978). That standard would require a court to force a nuclear power plant to obey an arbitral award to place back in the control room an employee found using drugs on the job. *But compare Borsari v. FAA,* 699 F.2d 106 (2d Cir.), *cert. denied,* 464 U.S. 833 (1983). It would require a court to defer to an arbitrator's decision to reinstate at a hazardous waste dump site an employee who accepted a bribe to permit illegal dumping. *Compare American Postal Workers Union v. United States Postal Service, supra,* 789 F.2d 1 (D.C. Cir. 1986); *United States Postal Service v. National Ass'n of Letter Carriers, supra,* 810 F.2d 1239 (D.C. Cir. 1987).

These hypotheticals may seem like a "parade of horribles," but they accurately reflect the reality of the *Northwest* case and the implication of the *Postal Service* cases. The fundamental flaw with the District of Columbia Circuit's and the union's view is that it focuses on the interests of employer and employee, and turns a blind eye to the interest of the public. Admittedly, it is an unusual case where the public has a real and substantial interest in the outcome of an individual employee's labor dispute. But there are cases where it does, and as the district court in the *Northwest* case recognized, the public truly may be affected by the result of the arbitration, yet is not represented in the collective bargaining process, and "is not a party . . . has not participated . . . and has not voluntarily consented to abide by the decision reached." *Northwest Airlines, Inc. v. Air Line Pilots Ass'n,* 633 F.Supp. 779, 793 (D.D.C. 1985). In such cases, the long-established rule prohibiting federal courts from enforcing contracts that contravene public policy is the only means by which the courts can protect public safety. The union and the District of Columbia Circuit, however, would deny the courts that power. Contrary to their myopic view, labor relations policies are not always paramount to other important public interests. *See Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984).

Far better is the approach of the First, Fifth, Seventh and Ninth Circuits—and the district court in *Northwest*—which, true to *W. R. Grace* and its antecedents, allows courts to consider factors beyond whether an award directly violates positive law. Those courts soundly decline to enforce an arbitral award reinstat-

ing an employee in a position of public trust if his on-the-job misconduct violated a statute or regulation that was specifically designed to protect the public interest or public safety. Under this view, a federal court, for example, must refuse to enforce a labor arbitrator's decision to order a public transportation employer to place the safety of its passengers in the hands of an on-the-job substance abuser. Under the District of Columbia Circuit's view, however, the court must lend its imprimatur to that unconscionable result.

CONCLUSION

This Court should reaffirm the validity of the existing public-policy rule and affirm the judgment of the court of appeals.

Respectfully submitted.

PHILIP A. LACOVARA
(Counsel of Record)
WILLIAM R. STEIN
PATRICIA A. DEAN

Hughes Hubbard & Reed
Washington, D.C.

Attorneys for Amici Curiae

June 1987.

APPENDIX

ATA MEMBERS

AirCal
Alaska Airlines
Aloha Airlines
American Airlines
Braniff
Continental Airlines
Delta Air Lines
Eastern Air Lines
Evergreen International Airlines
Federal Express
The Flying Tiger Line
Hawaiian Airlines
Midway Airlines
Northwest Airlines
Pan American World Airways
Piedmont Airlines
PSA-Pacific Southwest Airlines
TranStar Airlines
Trans World Airlines
United Airlines
United Parcel Service
USAir

Associate Members

Air Canada
Canadian Pacific Air Lines

AIR CONFERENCE MEMBERS

Airborne Express
AirCal
Alaska Airlines
Aloha Airlines
America West Airlines
American Airlines
Braniff Airways
Continental Airlines
Eastern Airlines
The Flying Tiger Line
Midway Airlines
Northwest Airlines
Pacific Southwest Airlines
Pan American World Airways
Piedmont Airlines
Reeve Aleutian Airways
Tower Air
Trans World Airlines
United Airlines
USAir
World Airways